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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

ALFRED P. DYER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED R. DYER,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden,
California State Prison at
San Quentin,
Respondent-Appellee.

No. 95-99002

D.C. No. CV-89-03454-VRW

OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Argued and Submitted
December 18, 1997—San Francisco, California

Filed August 6, 1998

Before: Procter Hug, Jr., Chief Judge, and James R. Browning, Betty B. Fletcher, Harry Pregerson, Stephen Reinhardt, Melvin Brunetti, Alex Kozinski, David R. Thompson, Diarmuid F. O'Scannlain, Thomas G. Nelson and Andrew J. Kleinfeld, Circuit Judges

Opinion by Judge Kozinski; Dissent by Judge Brunetti; Dissent by Judge O'Scannlain

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OPINION

KOZINSKI, Circuit Judge:

Petitioner was convicted of murder and sentenced to death. We consider whether he was denied a fair trial because one of the jurors obtained her seat by lying during voir dire.

I

In 1980 Alfred Dyer and two friends took four hostages and drove them into the remote hills overlooking Oakland, California. They ordered the hostages out of the car and instructed them to lie down alongside the road. Dyer and an accomplice then shot all four; amazingly, two survived. Dyer admitted participating in the shootings but argued diminished capacity.

During voir dire the jurors had been asked the usual questions, including:

> 13. Have you or any of your relatives or close friends ever been the victim of any type of crime? ...
>
> 15. Have you or any of your relatives or close friends ever been accused of any offense other than traffic cases?

Jessica Freeland, the last prospective juror to be questioned, answered "no" to both questions. She was named as an alternate and eventually was seated as a juror and helped decide Dyer's fate.

After the guilt-phase verdict, the defense learned that Freeland's brother Richard had been shot and killed some six years earlier. When questioned by the trial judge, Freeland explained that she had answered "no" to question 13 because she thought the shooting was an accident, not a crime. The trial judge accepted her explanation. The prosecutor-who had also prosecuted Richard Freeland's killer-had just turned over to the court the file in that case. A quick review of the file would have disclosed that the killing had none of the earmarks of an accident: Richard, who was just seventeen, was pistol-whipped four times and then shot in the back of the head. The prosecutor said nothing, the judge did not examine the file and therefore remained unaware of the facts which undermined Freeland's explanation. Freeland remained on the jury, which then sentenced Dyer to death. The California Supreme Court affirmed. See *People v. Dyer*, 45 Cal.3d 26, 246 Cal.Rptr. 209, 753 P.2d 1 (1988).

On federal habeas, Dyer's lawyers conducted an investigation of Jessica Freeland and discovered further evidence casting doubt on her veracity. The district court held an evidentiary hearing on the issue of juror bias but concluded that it was bound by the state court's finding of

impartiality and denied relief. A divided panel of this court affirmed. See *Dyer v. Calderon*, 122 F.3d 720 (9th Cir.1997). A majority of active judges subsequently voted to accept Dyer's suggestion for rehearing en banc.

II

A. The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate Dyer's right to a fair trial. *See, e.g., United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.1977). One important mechanism for ensuring impartiality is voir dire, which enables the parties to probe potential jurors for prejudice. For voir dire to function, jurors must answer questions truthfully. Nevertheless, we must be tolerant, as jurors may forget incidents long buried in their minds, misunderstand a question or bend the truth a bit to avoid embarrassment. The Supreme Court has held that an honest yet mistaken answer to a voir dire question rarely amounts to a constitutional violation; even an intentionally dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of impartiality. *See McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 555-56, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).[1] Accordingly, we must determine whether Freeland's answers were dishonest and, if so, whether this undermined the impartiality of Dyer's jury.[2]

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1. We do not condone any lying by jurors; perjury is perjury. We are concerned here, however, with the rights of the defendant, not with whether the juror may be prosecuted for a deliberate lie during voir dire. See, e.g., *Clark v. United States*, 289 U.S. 1, 11, 53 S.Ct. 465, 77 L.Ed. 993 (1933).

2. The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. See *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977). Like a judge who is

The state trial judge here held a brief hearing in chambers and found that Freeland was candid and impartial. The state clings to this finding, reminding us that juror impartiality is a question of historical fact. *See Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). Moreover, state court fact findings are presumed to be correct; we may set them aside only in limited circumstances specified by statute. See 28 U.S.C. § 2254(d)(1)-(d)(8) (1994).[3] Dyer argues that one of these circumstances applies to him, namely that "the material facts were not adequately developed" by the state courts. 28 U.S.C. § 2254(d)(3) (1994).

B. Freeland's candor first came into question after the jury found Dyer guilty of murder but before the start of the penalty phase. Freeland's estranged husband, Melvin Provost, had been arrested for rape earlier that month. Although the details are murky, it seems that Dyer and Provost crossed paths in the courthouse jail and Provost told Dyer that Freeland's brother had been shot and killed some years earlier. According to Dyer's lawyer, Provost said that Freeland "had expressed strong views about that event and the circumstances surrounding it." The court turned down defense counsel's request that Provost be called as a witness but encouraged counsel to investigate.

The next morning, just before the start of the penalty phase, the court returned to the question of Freeland's

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biased, see *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 71 L.Ed. 749 (1927), the presence of a biased juror introduces a structural defect not subject to harmless error analysis. See generally *Arizona v. Fulminante*, 499 U.S. 279, 307-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

3. The AEDPA does not apply retroactively to Dyer's appeal. See *Lindh v. Murphy*, --- U.S. ----, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

bias. The prosecutor, Jerry Curtis, explained that he was familiar with the Richard Freeland homicide:

> I remember the case of Richard Freeland as a homicide victim, I had the case myself, and it was a plea bargain case to a manslaughter. And it was a case where there was some kind of an argument in a block in front of some apartments and someone was killed.

Curtis then handed the file over to the judge, who called Freeland into chambers.

The judge asked Freeland if anyone in her family had been the victim of a homicide, and this time she answered yes. He then asked whether she was aware of any legal action taken, civil, criminal or otherwise. Freeland answered: "It was an accident. They didn't let us know when the trial was going on so we don't know what happened to the man that accidentally shot him." This, she felt, justified her voir dire answer: "Well, if it was an accident I don't think that's really a crime, is it?" Freeland then explained why she thought the shooting was accidental:

> The guy is not some, you know, maniac or anything like that. As a matter of fact, I saw him once or twice and he didn't look like he did this to my brother on purpose. He was the manager of an apartment that my brother happened to be at. It was a party going on and he was just trying to clear everybody out of the party because there was a fight or something, and what supposedly happened is that the gun went off and it happened to shoot my brother. So you can't hate somebody or accuse him for doing it on purpose, or something like that. That was his-you know, that's what he said and, you know, we had no choice but to

> believe him. He didn't even know my brother, so he had no reason to just shoot him for nothing. So it was just an accident.

(Emphasis added.)

Dyer's lawyer asked Freeland if she had spoken to the police or to the District Attorney about the case, and she answered no. He then asked: "And no one from your family ever testified in court at all?" Freeland responded, "Oh, no." The trial judge did not ask Freeland about her husband's statement that she had "expressed strong views" about the shooting. Nor did he question Freeland about the fact that her husband was then in jail, which seemed to conflict with her answer to voir dire question 15. Provost himself was never questioned.

On the basis of this hearing, which seems to have lasted less than five minutes, the judge retained Freeland on the jury: "She has explained her answer [to the voir dire questions], and I would not characterize anything she did or did not do as demonstrating any lack of candor, as far as I'm concerned." Was it plausible that Freeland could be so confused about the circumstances of her brother's death? Yes, the judge explained:

> There's no foundation establishing how well she knew the brother. We have brothers and we have brothers. We're making a whole series of assumptions. I don't know, you may not know, where the homicide occurred, how much information she had about it, except for her answers, and the record speaks for itself.

(Emphasis added.) Why the judge thought he could not verify the details of the crime-even where it

occurred-when he had the casefile in his hands, is a mystery.

C. A court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances. *See* 28 U.S.C. § 2254(d)(3) (1994); *Remmer v. United States*, 350 U.S. 377, 379, 76 S.Ct. 425, 100 L.Ed. 435 (1956); *Remmer v. United States*, 347 U.S. 227, 230, 74 S.Ct. 450, 98 L.Ed. 654 (1954). An informal in camera hearing may be adequate for this purpose; due process requires only that all parties be represented, and that the investigation be reasonably calculated to resolve the doubts raised about the juror's impartiality. *See Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); *United States v. Boylan*, 898 F.2d 230, 258 (1st Cir.1990). So long as the fact-finding process is objective and reasonably explores the issues presented, the state trial judge's findings based on that investigation are entitled to a presumption of correctness. *See Tinsley v. Borg*, 895 F.2d 520, 526 (9th Cir.1990).

As a predicate for his ultimate finding that Freeland was not biased, the state judge found that Freeland did not "demonstrate[ ] any lack of candor" in response to voir dire questions 13 and 15. The judge did not explain his reasoning fully, but his comments suggest the following chain of logic:

> 1. Freeland claims she did not mention her brother's murder in response to voir dire question 13 because she thought it was an accident.
>
> 2. She would not have been aware of the circumstances of her brother's death if they were not very close. ("We have brothers and we have brothers.")

3. There is no evidence that Freeland and her brother were close. ("There's no foundation establishing how well she knew the brother.... I don't know ... where the homicide occurred, how much information she had about it.")

Freeland's relationship with her brother thus was the fulcrum of the judge's finding that Freeland was candid. If Jessica and Richard were siblings in name only-if they were separated at birth and lived in distant cities-Freeland's claim that she didn't know exactly how her brother died would be plausible.[4] But Jessica and Richard were not estranged; in fact, they lived under the same roof, with their mother. As one would expect, Freeland attended her brother's funeral. Their mother, moreover, testified at the preliminary hearing (there was no trial) of Richard's killer. At the time of the testimony, Jessica and her mother were still living together. Other readily available facts also suggest that the judge was wrong to infer that Jessica and her brother weren't close. The criminal casefile noted that Freeland was a plaintiff in a civil suit against Richard's killer. As a plaintiff in a wrongful death action, Freeland claimed she had suffered because of the death of her brother; this too suggests they were close enough for her to know that the killer was charged with a crime.

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4. We say this only because we give very wide berth to the state trial judge's findings. For our part, we find it hard to believe that a sister would be aware that her brother was killed by gunfire yet be so unmindful of the details as to believe it was an accident. This is especially so since Richard's mother was alive and no doubt discussed the details of the killing as part of the normal bereavement process. *See* Eric Schlosser, *A Grief Like No Other*, Atlantic Monthly, September 1997, at 52.

In any event, Freeland never claimed she was estranged from her brother or that she was unaware of how he died. Rather, she stated several times that she knew the details of the shooting and had reason to believe it was an accident. See supra at 8579-80. Whether her explanation was plausible-not whether she and her brother were close-was the key to determining if Freeland had lied during voir dire. The actual facts of the crime were remarkably different from Freeland's description: Richard was pistol-whipped four times and shot in the back of the head, much like Dyer's own victims. It is inconceivable that Freeland, living under the same roof as Richard, their mother and two other siblings, could have been so confused.

Are these facts the state trial judge should have uncovered? We think so. If the judge thought that the plausibility of Freeland's explanation turned on how well she knew Richard, he could have asked her. Or he could have asked Curtis, the prosecutor. Or he could have examined the casefile, which showed that Freeland's mother had testified at the preliminary hearing in the criminal proceeding, that Freeland herself was a plaintiff in the civil suit and that the shooter was charged with murder.[5] Or he could have ordered Provost brought in to testify as to what he knew about Freeland's relationship with her brother. Indeed, Provost had been reported as saying that Freeland had expressed strong feelings about her brother's killing-which was not only inconsistent with

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5. As the case ended in a plea bargain, the file was not very big, so it would not have taken very long for the judge to examine it. Nevertheless, if the judge did not wish to postpone the sentencing hearing to make such an examination, he could have taken the matter under advisement and examined the file over the course of the next day or two.

the nonchalance she displayed when questioned about it, but also bespoke bias on her part.[6]

The judge did none of these things, leaving the matter in doubt: "We're making a whole series of assumptions," he said. But a judge investigating juror bias must find facts, not make assumptions, and here the key facts were easily discernible. A few questions to Jessica about her relationship with her brother; an examination of the casefile; a request for confirmation from the prosecutor; an order to bring Provost into court-any or all of these would have disclosed that Freeland knew a lot more about her brother's death than she was letting on. Perhaps the judge was lulled into a false sense of security by the prosecutor's assurance that he was familiar with the Richard Freeland homicide; the judge might have understood the prosecutor's silence as confirming that Jessica's explanation was plausible.[7] In these circumstances, "it was the [trial] court's obligation to develop the relevant facts on the record, not merely presume them." *United States v. Gaston-Brito*, 64 F.3d 11, 13 (1st Cir.1995). The judge's lack of verve in pursuing the matter casts doubt on his findings.

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6. The judge was thus wrong when he said that "the record speaks for itself" as to Freeland's lack of bias. Provost's statement, as reported by Dyer's lawyer, was also part of the record and flatly contradicted Freeland. While Provost's statement, as reported, was multiple-level hearsay, it could have been made much more definite if Provost had been questioned about it at the bias hearing.

7. The prosecutor had an ethical obligation to bring to the judge's attention evidence that would cast light on the question on which the judge focused-namely whether Jessica was in a position to know how her brother was killed. Had this incident occurred in federal court, we might have considered whether the prosecutor's silence amounted to misconduct. *See, e.g., United States v. Kojayan*, 8 F.3d 1315 (9th Cir.1993).

To warrant setting aside the presumption of correctness, facts left undeveloped by the state court must be "material," *see* 28 U.S.C. § 2254(d)(3), not trivial or tangential to the issue presented. Indeed, something more than the usual meaning of "material" seems to be required: The missing facts must be "crucial," "vital" or "indispensable to a fair, rounded, development of the material facts." *Townsend v. Sain*, 372 U.S. 293, 321-22, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); *see also Thomas v. Zant*, 697 F.2d 977, 986 (11th Cir.1983). What this means is that the evidence not discovered (that an adequate hearing would have discovered) must be so significant that a reasonable fact-finder could have decided the bias question differently if armed with this knowledge. In other words, there must be a material possibility that the judge would have made a different decision if he had been aware of the facts in question.

Is there a material possibility the state trial judge would have found that Freeland was not impartial had he considered all the facts readily available to him? We believe there is. Had he questioned Freeland about her relationship with her brother, the judge would have discovered that the siblings were, in fact, very close; he would have learned that they lived in the same household and that she attended his funeral. And, had the judge just cracked open the casefile, he would have learned that Freeland's mother testified in the criminal proceeding and that Freeland herself was a plaintiff in the wrongful death action. All this would have cast considerable doubt on Freeland's explanation that she thought the killing was an accident and could well have shaken the judge's confidence in Freeland's veracity. And, once the trial judge determined that Freeland lied about her brother's death, he might well have developed doubts about her impartiality.

The bias hearing was deficient in other ways as well. The trial judge left untouched Freeland's negative answer to voir dire question 15: "Have ... any of your relatives or close friends ever been accused of any offense other than traffic cases?" The judge's failure to question Freeland about her husband's criminal history is remarkable because the issue of Freeland's potential bias arose when Dyer and Provost met in a jail cell during the trial. Situations where a juror's husband lands in the same jail cell as the defendant are sufficiently rare and troublesome to merit a close look by the trial judge.[8] There may have been a legitimate explanation for Freeland's failure to disclose that her husband was in jail, but the trial judge never put her to the test. Ten years later, in her deposition, Freeland claimed a fuzzy memory: "When I found out [Provost] was in trouble either the case was already over or we were already past voir dire." But Provost had been arrested a full month before the trial, and Freeland paid him a visit. Had she been asked about this at the time, the date of her visit could have been confirmed by consulting prison visitation records. Maybe Freeland knew of her husband's arrest during voir dire, maybe she didn't. The trial judge passed up the opportunity to find out.

The trial judge's most serious blunder was his failure to pursue Provost's statement that Freeland "expressed strong views" about the circumstances of her brother's killing. One potential juror had been excused for cause because she admitted to having "strong ... feelings that people who are involved in drugs or have anything to do with drugs I just don't care for them."[9] If Freeland had

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8. For one thing, one would have to wonder whether Provost told Freeland anything about Dyer's statements and conduct that might bear on her evaluation of his guilt or innocence.

9. We express no view as to whether such a juror would have to

strong views about her brother's death-entirely plausible given Freeland's later admission that she was very close to her brother-this might have undermined her ability to render an impartial verdict; it certainly would have cast a sinister light on her failure to mention the killing in her response to question 13.

Dyer's lawyer, John Burris, went to the heart of the matter when he asked the court to bring Provost in for questioning. The trial judge refused because at that point defense counsel had no evidence to support the allegation; the whole thing might have been ginned up by Dyer to throw sand into the machinery of the trial. The judge thus reasonably directed Burris to gather basic information about "whether in fact there was a death and whether it was a death that occurred in such an instance, because we want to know the preliminary fact whether she has a brother by that name, and all of these things that have to be looked at." The judge held open the possibility of calling Provost later: "I don't know about subpoenaing somebody at this stage. It may be necessary to do that. It could become necessary, let me put it that way."

Yet, the next morning, when the prosecutor produced a casefile confirming Dyer's account of what Provost had told him, the judge did not call Provost. Richard's death was no invention; everything Dyer had reported that could be verified turned out to be true. The trial judge thus had no basis for shrugging off Provost's further statement that Freeland had expressed strong views about the shooting. Had Provost been called as a witness, he could have elaborated on his statement and reported any bias Freeland might have exhibited as a result of that traumatic

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be excused as a matter of due process. We note this only as an authoritative determination of how the state law would operate in these circumstances.

experience. He most certainly could have shed light on whether Freeland was telling the truth when she claimed that she thought her brother was killed by accident. Since Provost was in jail, there would have been no delay in trying to locate and subpoena him. Had the judge ordered him to appear, he would have been brought in post-haste.

The California Supreme Court laid the blame for the inadequate factual development at the bias hearing on the shoulders of defense counsel. *See People v. Dyer*, 45 Cal.3d 26, 59, 246 Cal.Rptr. 209, 753 P.2d 1 (1988). *See generally Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992) (applying cause-and-prejudice standard to inadequate factual development attributable to attorney error). Specifically, the court refused to take judicial notice that Freeland was a plaintiff in the civil action and that an opinion in the criminal case against Richard's killer stated that the attacker "struck the victim on the head four times with a pistol and then shot him in the back of the head." *Dyer*, 45 Cal.3d at 59, 246 Cal.Rptr. 209, 753 P.2d 1. It did so because "[e]ach of the facts of which defendant now requests us to take judicial notice could have been presented to the trial court." *Id.*

The California Supreme Court overlooked the fact that this evidence was before the trial court at the time of the hearing; it was all contained in the criminal casefile of Richard's killer. The court also did not take account of the fact that Curtis, the prosecutor, was very familiar with the case and had an obligation to share his information with the court and opposing counsel. And, of course, Freeland herself and Provost were available to be questioned on these points. This was not a case where defense counsel failed to discover relevant evidence or knowledgable witnesses.

Where Burris might have been more aggressive is in questioning Freeland and pointing out the conflict between her claim that she thought Richard's killing was an accident and the information available in the casefile. Burris, however, was seriously handicapped in preparing for the hearing. He could not contact Freeland and question her, so he had no clue as to how she would respond when confronted with her brother's murder. Even if Burris had access to the casefile before the hearing-which we assume though it's nowhere disclosed in the record- he could not have examined the file with an eye towards rebutting Freeland's as yet untold story. By the time Freeland testified, the file was with the judge. Nor could Burris be too aggressive in questioning Freeland, who would soon have his client's life in her hands. Freeland might well have taken umbrage at counsel's suggestion that she was lying, especially as it exposed her to charges of perjury. Burris recognized as much when he said, "[M]aybe I'm not in a position to really get a candid answer." Counsel also had his hands full preparing for the penalty phase, which began just minutes after the bias hearing.

Given the extremely delicate situation when a juror is suspected of prejudice or misconduct, the trial judge must assume the "primary obligation ... to fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial." *United States v. Boylan*, 898 F.2d 230, 258 (1st Cir.1990). While a trial is ongoing, lawyers may not conduct the kind of aggressive investigation of jurors they would of other witnesses. In such circumstances the trial judge fulfills his duty only if he "erects, and employs, a suitable framework for investigating the allegation [of bias] and gauging its effects[.]" *Id.* Where juror misconduct or bias is credibly alleged, the trial judge cannot wait for defense counsel to spoon feed him every bit of information which would

make out a case of juror bias; rather, the judge has an independent responsibility to satisfy himself that the allegation of bias is unfounded.

Here, Burris did quite a bit, given the constraints of time and circumstance. He promptly advised the court that one of the jurors may have failed to disclose highly relevant information during voir dire. At the trial judge's direction, he obtained corroboration for the information from the prosecutor, including the casefile. He requested that Provost be brought in for questioning, and when that request was denied, he had co-counsel interview Provost in jail and then reported what he said to the court. At the hearing, Burris asked Freeland the right questions and timely objected when the court ruled against him. And immediately following the hearing he drew the court's attention to the key fact contained in the file, namely that "the blue card from the prosecution ... certainly suggests that her brother was shot in the back of the head and died in somewhat of a violent manner." Given the delicate circumstances and the fact that the penalty phase of the trial was moments away, it's hard to fault Burris for not doing more. It seems to us that counsel did enough to alert the trial court to the problem; it was then up to the judge to give the matter the attention it obviously deserved.

We are not unmindful that the trial judge too was in a difficult position. Through no fault of his own, the verdict in a five week murder trial was suddenly in jeopardy. Freeland was the last alternate juror; removing her would have required the court to set aside the guilty verdict, empanel a new jury and start from scratch.[10/]

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10. Because the verdict was in, the trial judge would probably not have been free to reopen jury deliberations, even if another alternate had been available.

Had Freeland's omissions been discovered during voir dire, another juror could have been selected. With five weeks of trial completed and a verdict in hand, the problem had no comfortable solution. No judge would be eager to discover bias in these circumstances, and we attribute the trial judge's complacency to an ostrich-like desire to avoid learning anything that would jeopardize the verdict.

Whatever the reason, the judge did not avail himself of evidence that was, almost literally, right under his nose. Instead, he made a finding that Freeland told the truth-a finding that is nearly inexplicable given what he knew, and positively irrational given what he could easily have learned. If what happened here is an adequate investigation into juror bias, we are at a loss to say what is not.

III

Because the facts were not properly developed by the state court, its finding that Freeland was unbiased is not entitled to a presumption of correctness.[11] Under such circumstances, the federal courts must address the question de novo, considering not only the evidence developed in state court, but also other evidence which comes to light afterward. *See Rhoden v. Rowland*, 10 F.3d

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11. State appellate court findings are normally entitled to a presumption of correctness as well. See Sumner v. Mata, 449 U.S. 539, 546, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). But the California Supreme Court here did not cure the inadequacy of the trial court's hearing. It explicitly refused to consider any of the circumstances surrounding Richard's shooting. See People v. Dyer, 45 Cal.3d 26, 59, 246 Cal.Rptr. 209, 753 P.2d 1 (1988). Because the California Supreme Court's findings were grounded in the same incomplete record as the trial court's, its findings are no more entitled to a presumption of correctness.

1457, 1460 (9th Cir.1993). While the district court made no findings, it nevertheless held an evidentiary hearing. We can therefore consider the question of whether Freeland was biased with the benefit of a fully developed record. This record conclusively answers our two key questions: First, Freeland plainly lied when she answered "no" to voir dire questions 13 and 15; no rational trier of fact could find otherwise. And she lied again when she was questioned by the state judge in chambers-presumably to cover her earlier lie and remain on the jury. Second, Freeland's lies give rise to an inference of implied bias on her part. Because implied bias is a mixed question of law and fact reviewable de novo, *see Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir.1991), there is no need to remand to the district court for consideration of this issue in the first instance.[12]

A. The circumstances of Richard's killing were such that Freeland could not possibly have confused it with an accident. Freeland's account of what happened made it sound like the shooter was waving his gun around, and the gun happened to go off in the direction of her brother.[13] But the California Court of Appeal reviewing the indictment of Richard's killer described the event as "an angry confrontation between [the shooter] and the victim[.]" The court concluded that "the fact that [the

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12. Because we conclude that Freeland lied, we need not decide whether dishonesty is a necessary predicate to a finding of juror bias. *Compare McDonough*, 464 U.S. at 556, *with id.* at 556-57 (Blackmun, Stevens and O'Connor, JJ., concurring); id. at 558 (Brennan and Marshall, JJ., concurring in the judgment); *Zerka v. Green*, 49 F.3d 1181, 1186 n. 7 (6th Cir.1995); *Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir.1992); *Cannon v. Lockhart*, 850 F.2d 437, 440 (8th Cir.1988).

13. That anyone would think such a reckless killing is not a crime itself stretches credulity.

shooter] struck the victim on the head four times with a pistol and then shot him in the back of the head suggests an inference of malice." This paints quite a different picture from Freeland's account of the incident and explains why Curtis charged the shooter with murder.

Did Freeland know what really happened? No doubt. In her deposition, Freeland acknowledged that she and Richard were "very close." It is inconceivable that the brutal circumstances of Richard's killing would not have been discussed within the Freeland household; indeed, Freeland's father testified that no one in the family had ever spoken of the killing as an accident. Nor is it believable that Freeland would have been unaware that her mother testified at the killer's preliminary hearing, which happened within ten weeks of the shooting.

Freeland's account of Richard's death was just the tip of Pinocchio's nose. Freeland also lied when she said she had never been a victim of crime. When she was a child, at a time when her parents were separated, Freeland's father kidnapped her and her siblings. Freeland explained that "the police finally caught up with us and he was arrested." When Freeland was a teenager she was attacked by her cousin, Buddy, who broke into her house in the dark, showed a knife and pulled her underwear off before she fought him off. Freeland's father called the police. Freeland downplayed the incident in her deposition, but admitted that it "scared the hell out of me."[14]

Freeland also failed to mention the many burglaries to which she had fallen prey. Her cars had been broken

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14. No doubt these events were embarrassing to Freeland, and she may not have wanted to air her family's dirty linen in public. Yet she could have asked that she talk about the events in chambers, as other potential jurors had done during voir dire.

into so many times she lost count. One car had been stolen outright. Her home had been burglarized on at least three occasions. During her deposition Freeland vividly recalled walking in on one robbery and watching as the burglar fled through the back door with a sack of loot thrown over his shoulder "like Santa Claus' bag." Several potential jurors had disclosed burglaries during voir dire; Freeland watched as most of them were picked off by peremptory challenge.[15] Being the last to be seated, Freeland was not taken by surprise; the trial judge had instructed the potential jurors to "[m]ake sure that while this process is going on that you hear every question that is asked and every answer that is given[.]" Lest the point be lost, the judge continued, "[A]s I've indicated to you before, you have a right to hear, and a duty to hear. So make sure that you do." Freeland sat through the questioning of 74 potential jurors over the course of five days and had time to consider how she would answer the same questions when her turn came. When her turn did come, Freeland answered "no" to voir dire questions 13 and 15, even though her incidents were far more serious, both in number and magnitude, than those disclosed by others who had preceded her.

Equally inexplicable was Freeland's negative response when she was asked if any "relative" had been "accused of any offense other than traffic cases." Freeland's husband had been arrested on rape charges just a month before

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15. Courtney Coleman stated that "I've had my house-when I was living in Union City when I was married I had my house broken into several times. I also had my wife's car stolen twice." Barbara Covarrubias stated, "My house was broken into three times in one year." Dale Gritton stated, "My brother has had his apartment broken into several times." John Braucht stated that a burglar, "I guess supposedly under the influence of drugs, broke into my parents' home while they were there[.]"

trial. In her deposition, Freeland explained that she did not consider her husband to be a relative, but other prospective jurors had offered information about in-laws and former spouses. Freeland and Provost were still legally married, and Freeland went to visit him shortly after his arrest.

Even if her nondisclosure about Provost could somehow be explained, the arrest record of other relatives cannot. Freeland's father was arrested for the kidnapping already mentioned. Freeland's uncle, Jason Caldwell, who lived with the Freelands from time to time, had been arrested for murder in Louisiana in 1970. Caldwell was arrested again in 1978 in connection with an armed robbery and pled guilty to being an accessory after the fact. Caldwell was paroled to Oakland a few years later. In 1980 Freeland's brother Billy had been convicted of possessing brass knuckles. And less than a month before the voir dire, Billy was arrested for possession of LSD and marijuana.

Freeland's family had a long history with the law, and not every event might have come to mind as Freeland sat in the jury box during voir dire. But her failure to mention that any of her relatives had been accused of crime defies an innocent explanation. Nearly every close relative of hers had been arrested: Her husband for rape; her father for kidnapping; her uncle Jason for murder, and again for armed robbery; her brother Billy for possession of brass knuckles, and again for drug possession; her cousin Buddy for attempted rape of Freeland herself. Freeland overlooked too many incidents for us to attribute her responses to mere forgetfulness.

Indeed, in her deposition Freeland did not claim to be forgetful.[16] Rather, she steadfastly maintained that she-not the court, not the defense, not the prosecutor-was the best and only judge of what information was relevant. As to the countless burglaries of her cars and homes, she explained that she thought that these events had no bearing on her impartiality:

> I didn't have time to rack my brain to remember every time my car or house had been burglarized and *it didn't have a bearing on the case to me* because if you live in Oakland, I don't know of anyone who lives in Oakland who has never been burglarized.

(Emphasis added.) Freeland even shrugged off the suggestion that burglary could be considered a crime: "It's just a way of life and it's just the way things go. It was not a traumatic event that caused me to be so bitter that I would irrationally try to pay back someone like Alfred Dyer who has evidently done burglaries or robberies." *Id.* Freeland even belittled the significance of her uncle's arrest for murder: "Am I to reveal everything, the little information I know about other relatives? That's ridiculous. If that's what they wanted and you feel I have been unfair by not saying a distant relative has done something, then let Alfred Dyer get a new trial." Later, Freeland stated forthrightly, "I dislike giving information,

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16. The district court did not hear Freeland testify because she evaded twenty-one separate attempts by the petitioner to subpoena her. Because the district court deferred to the trial court under section 2254, we do not have the benefit of an independent finding of impartiality to review. The district court did, however, review Freeland's deposition testimony, and was not convinced that Dyer had shown enough to overcome the presumption of correctness. This, of course, is not the same as an independent finding of lack of bias.

period. Information that to me is not relevant.... [E]ven if my brother was the victim of a violent crime, how can you take that little information and say, 'Here she was unfair to Alfred Dyer.' "

B. Because the record conclusively establishes that Freeland lied, and lied repeatedly, we proceed to consider whether her lack of candor reflects an "[in]ability to render an impartial verdict." *Smith*, 455 U.S. at 220.

Whether Freeland was actually biased-i.e., whether she was disposed to cast a vote against Dyer-is difficult to figure out eighteen years later. Freeland acknowledged that she was very close to her brother, and added that the period following his death was painful. It's certainly possible that anger about her brother's killing drove Freeland to finagle a seat on the jury so she could lobby for a conviction and death sentence. Freeland herself was a victim of many crimes, and she may have wanted to use her jury service to send a message of deterrence. On the other hand, the fact that many of her relatives had been arrested suggests she could have harbored some empathy for criminal defendants. However, we need not resolve the actual bias question, which would first require factual findings by the district court, because the implied bias issue is dispositive here. Thus, we need not speculate further about what motivated Freeland to lie.

In extraordinary cases, courts may presume bias based on the circumstances. *See McDonough*, 464 U.S. at 556-57 (Blackmun, Stevens and O'Connor, JJ., concurring) (accepting doctrine of implied bias in exceptional circumstances); *id.* at 558 (Brennan and Marshall, JJ., concurring in the judgment) (same); *Zerka v. Green*, 49 F.3d 1181, 1186 n. 7 (6th Cir.1995); *Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir.1992); *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir.1990); *Cannon v. Lockhart*, 850 F.2d 437,

440 (8th Cir.1988); *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir.1979); *United States v. Allsup*, 566 F.2d 68, 71-72 (9th Cir.1977).

What kind of circumstances give rise to a finding of implied bias? In *Smith v. Phillips*, Justice O'Connor gave some examples of situations where bias may be presumed: "a revelation that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." 455 U.S. at 222 (concurring opinion). Of course, a juror could be a witness or even a victim of the crime, perhaps a relative of one of the lawyers or the judge, and still be perfectly fair and objective. Yet we would be quite troubled if one of the jurors turned out to be the prosecutor's brother because it is highly unlikely that an individual will remain impartial and objective when a blood relative has a stake in the outcome. Even if the putative juror swears up and down that it will not affect his judgment, we presume conclusively that he will not leave his kinship at the jury room door. The effect of this factor would be impossible to predict: Would the juror yield to his sympathies, or fight them and lean the other way? There is no way to know, but permitting such a juror to serve would introduce into the jury room an extraneous influence that could materially color the deliberations. The juror in question would be lacking the quality of indifference which, along with impartiality, is the hallmark of an unbiased juror.

Jessica Freeland was not involved in the crime which was the subject of the case, nor did she have a personal relationship with any of the trial participants. But there is every indication that she was not indifferent to service on the jury. After watching a number of potential jurors disclose relatively minor crimes and get dismissed, she chose to conceal a very major crime-the killing of her

brother in a way that she knew was very similar to the way Dyer was accused of killing his victims.[17] She also failed to disclose many other facts that would have jeopardized her chances of serving on Dyer's jury. Later on, when she was questioned about her brother's death, she lied once again by pretending she thought it was an accident, and by telling the judge that no one in her family had testified about the killing. The inference we draw from all this is that Freeland lied in order to preserve her status as a juror and to secure the right to pass on Dyer's sentence.

We don't know why Jessica Freeland so cherished her seat on Dyer's jury.[18] Jury service is a civic duty that citizens are expected to perform willingly when called upon to do so. But there is a fine line between being willing to serve and being anxious, between accepting the grave responsibility for passing judgment on a human life and being so eager to serve that you court perjury to avoid being struck. The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent. Whether the desire to serve is motivated by an overactive sense of civic duty, by a desire to avenge past wrongs, by the hope of

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17. At the time of voir dire the judge had already informed the venire that Dyer was on trial for murder and attempted murder, with a handgun, and that the state had asked for the death penalty.

18. In yet another bizarre twist, after Dyer's trial Freeland became an officer with the California Department of Corrections and served as a guard on death row in San Quentin, where Dyer is held awaiting execution. Freeland later became a parole agent, and on at least two occasions-in violation of prison regulations-she reviewed and photocopied portions of Dyer's confidential Department of Corrections Central File to check up on the status of his appeal. While it is hard to know what to make of these facts-they are too few in number to prove that Freeland was on a vendetta or had a particular interest in seeing Alfred Dyer executed-they certainly are not consistent with the picture of a model indifferent juror.

writing a memoir or by some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out.[19]

A juror, like Freeland, who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process. There is, of course, the possibility that she did so because of some personal bias against the defendant which she managed to hide from the court. But a perjured juror is unfit to serve even in the absence of such vindictive bias. If a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror-to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions-with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

Writing for a unanimous Court, Justice Cardozo concluded that a juror who lies his way into the jury room

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19. For example, a juror who lies his way on because he secretly plans to write a memoir of the experience might then vote differently to provide drama, or he might inject personal prejudice into the jury room in an attempt to jazz up the deliberative process. Similarly, a juror who lies because he disputes the importance of following the judge's instructions may also walk to his own beat when considering the meaning of reasonable doubt. *See* Jeffrey Rosen, *One Angry Woman*, New Yorker, Feb. 24-Mar. 3, 1997, at 54-64 (noting erosion of public confidence in unanimous jury system caused by irrational holdout jurors).

is not really a juror at all: "The judge who examines on the *voir dire* is engaged in the process of organizing the court. If the answers to the questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only." *Clark v. United States*, 289 U.S. 1, 11, 53 S.Ct. 465, 77 L.Ed. 993 (1933). Clark held that a juror who obtains that position by committing fraud on the court is no more entitled to the privileges of that position than a stranger who sneaks into the jury room: "His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham." *Id.*[20]

Were we to follow *Clark* to the letter, we would have to conclude that Dyer was not convicted by a jury of twelve, but by eleven jurors and one intermeddler. We need not go quite so far, because we can resolve the case on narrower grounds. *Clark* is nevertheless instructive because Justice Cardozo there equates a juror who lies his way onto the jury to a juror who is related to a litigant: "If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different." *Id.* Just as we would presume bias if the brother of the prosecutor were on a jury, we presume bias where a juror lies in order to secure a seat on the jury.[21]

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20. The question in *Clark* was whether the juror's statements in the jury room could be considered in convicting her of having lied during voir dire. In holding that the statements could be considered, the Court had to overcome the privilege then accorded to communications between jurors during deliberations. The Court held that the privilege does not apply because a juror who obtains his position by fraud is not in fact a juror. While this statement was made in a context very different from ours, it is clearly a holding and not dicta.

21. Having committed perjury, a juror in Freeland's position might realize that the likelihood of being prosecuted diminishes

More is at stake here than the rights of petitioner; "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954). An irregularity in the selection of those who will sit in judgment "casts a very long shadow." *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir.1987). A perjured juror is as incompatible with our truth-seeking process as a judge who accepts bribes. *Cf. Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97 (1997).[22] In this regard we agree with Chief Judge Winter:

> [C]ourts cannot administer justice in circumstances in which a juror can commit a federal crime in order to serve as a juror in a criminal case and do so with no fear of sanction so long as a conviction results. The government's brief exhibits no concern over the possible criminality of the juror's conduct and asks us to affirm without further inquiry.... [W]hether the government chooses to prosecute such cases is not for us to decide. We need not reduce its incentives to take such conduct seriously, however, by giving the government cause to believe that overlooking juror misconduct will preserve tainted convictions.

United States v. Colombo, 869 F.2d 149, 152 (2d Cir.1989) (internal citations omitted).

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significantly if she votes to convict. *Compare Clark*, 289 U.S. at 9, *with United States v. Colombo*, 869 F.2d 149, 152 (2d Cir.1989).

22. The doctrine of implied bias has a counterpart in the canons of judicial ethics which require judges to disqualify themselves if they have even the smallest stake in the proceedings, or if they believe that their impartiality might reasonably be questioned. *See Bracy*, 117 S.Ct. at 1797; ABA Code of Judicial Conduct, Canon 3E (1990). Both rules safeguard both the existence and the appearance of justice.

Not all jurors may walk a perfectly straight line. A distracted juror might fail to mention a magazine he subscribes to. An embarrassed juror might exaggerate the importance of his job. Few voir dires are impeccable, and most irregularities can be shrugged off as immaterial to the fairness of the trial. But the magnitude of Freeland's lies and her remarkable display of insouciance- her expressed feeling that only she would decide what matters-fatally undermine our confidence in her ability to fairly decide Dyer's fate. The facts here add up to that rare case where we must presume juror bias.[23] *See Burton v. Johnson*, 948 F.2d 1150 (10th Cir.1991).

IV

Presumed bias dates back in this country at least to Aaron Burr's trial for treason, where Chief Justice Marshall, riding circuit, noted that an individual under the influence of personal prejudice "is *presumed* to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony." Marshall explained, "He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; *but the law will not trust him*." *United States v. Burr*, 25 F. Cas. 49, 50 (D.Va.1807) (emphasis added). In the common law, implied bias can be traced all the way back to Sir Edward Coke's dictum in *Bonham's Case* that no man shall be judge in his own cause. See Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (C.P.1610). This pedigree

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23. We appear to be unanimous that if Freeland knew the circumstances of her brother's death, we must presume bias. *See* Brunetti dissent, infra, at 8609 ("In order for Freeland to have the necessary relationship to create the emotional involvement she would have had to know and understand the circumstances and facts of her brother's death to be a brutal murder."). We part company only as to whether such knowledge can be imputed to Freeland.

neatly disposes of the state's argument that implied bias would be a "new rule" barred by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Implied bias may indeed be the single *oldest* rule in the history of judicial review, as *Bonham's Case* is often identified as the first case in which a court struck down a duly enacted legislative act. *See, e.g.*, Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L.Rev. 1127, 1130 (1987).

Judge O'Scannlain nevertheless argues that implied bias is not an established rule of constitutional procedure because we can point to no Supreme Court case announcing it. But a rule needs to be announced for purposes of *Teague* only if it's *new*. What we have here is the antithesis of *Teague*-a rule so deeply embedded in the fabric of due process that everyone takes it for granted. This is precisely what the Supreme Court did in *Clark v. United States*, 289 U.S. at 11. Offering an obvious example of someone who would not be qualified to serve as a juror, it mentioned a relative of one of the parties: "If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different." *Id.* Such a juror, the Court said, would be a juror "in name only." *Id.* The Court there understood-as every court that has dealt with the question has understood-that prejudice must sometimes be inferred from the juror's relationships, conduct or life experiences, without a finding of actual bias.

In *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927), the Court made it clear that bias must sometimes be presumed, even though the decision maker may be completely unbiased. In *Tumey*, a man in a small Ohio town was tried for unlawful possession of liquor. The Mayor also served as judge. In addition to his salary as Mayor, he received a small cut of each fine he imposed as

a judge. The Supreme Court unanimously held that a conviction so imposed violates due process. The Court first acknowledged that some fact- finders would not actually be prejudiced by a personal stake in the outcome: "There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it[.]" *Id.* But, the Court held, subjective state of mind is not dispositive when the circumstances create an inference of bias. "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.* Rather, the Court held, we must look to the fairness of the procedure and whether bias should be presumed from the circumstances: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Id.* As in *Clark*, the Court in *Tumey* never stopped to question whether bias can be presumed from circumstances. Rather, it accepted the doctrine of implied bias as a given and applied it to the facts of the case.

Nothing in *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) or *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) is to the contrary. In Smith, Justice Marshall dissented, worrying that the majority was doing away with the doctrine of implied bias. Justice O'Connor joined the opinion on the understanding that it did not abolish the doctrine, *see id.* at 221, and the majority said nothing to the contrary. *Smith* has no bearing on our case unless we assume the majority tacitly did what Justice Marshall accused it of doing. That it did not is confirmed by *Greenwood*, where the Court held that the bias could not

be implied on the facts of that case, but assumed that the doctrine does, in fact, exist. *See Greenwood*, 464 U.S. at 556-57 (Blackmun, J., concurring, joined by Stevens and O'Connor, JJ.) (fifth, sixth and seventh votes of majority). *Accord Leonard v. United States*, 378 U.S. 544, 84 S.Ct. 1696, 12 L.Ed.2d 1028 (1964); Tumey, 273 U.S. at 532.

No opinion in the two centuries of the Republic-except the dissent in our case-has suggested that a criminal defendant might lawfully be convicted by a jury tainted by implied bias.[24] Under the dissent's logic, reasonable jurists could hold that Dyer would have been accorded due process even if he had been convicted by a jury comprised of the following twelve individuals: (1) the mother of Jerry Curtis, the prosecutor, (2) Curtis's former law partner, (3) Oakland's Chief of Police, (4) the Grand Dragon of the Bay Area KKK, (5) the sister of Floyd Murray, who died in the shooting, (6) Floyd Murray's mother, (7) the victim of Dyer's prior robbery, (8) Dyer's ex-wife, (9) the District Attorney, (10) an Oakland councilman running for re-election on a "tough-on-crime" platform, (11) Melvin Provost, Dyer's cellmate, and (12) Provost's wife, Jessica Freeland-so long as they had all sworn they would be fair. We, on the other hand, believe that no reasonable jurist would take that position. Rather, jurists of reason would all agree that each of these individuals, had they made their way onto the jury, should

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24. The dissent cites *United States v. Malloy*, 758 F.2d 979 (4th Cir.1985), for the proposition that "the federal courts of appeals were split on the issue of implied bias." O'Scannlain dissent at 8622. *Malloy* does nothing more than refuse to find implied bias on a particular set of facts. *See Malloy*, 758 F.2d at 981 ("Malloy urges us to adopt a per se rule [of implied bias] in joint service cases. We decline the invitation."). Courts disagree (*e.g., Smith*) about when the doctrine applies, not whether it exists.

have been struck without stopping to inquire into their subjective state of mind.

The panel opinion is VACATED, the district court is REVERSED and the case is REMANDED for further proceedings.

Brunetti, Circuit Judge, dissenting, with Judges Thompson, O'Scannlain, and Kleinfeld, joining.

Today's opinion sets forth a new rule of law that is a substantial departure from our precedent and deals a serious blow to the power of the trial court. Our system of law mandates deference to the trial court on certain issues regarding facts and credibility of witnesses. Today, that deference is pushed aside so that the appellate court may not only review the applicable laws, but also decide the facts. Our position has never been to sit as a finder of fact and I cannot support the extension of our power to do so. For the reasons that follow, I respectfully dissent.

I. Actual Bias Standard

The Sixth Amendment "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). The Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). As the majority points out, due process requires only that the defendant be tried by a "jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.* For Dyer to be entitled to a new trial, he would have to "first demonstrate that a juror failed to

answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).

In reviewing a petition for habeas, we presume the correctness of state court findings of "basic, primary, or historical facts" unless one of the eight statutory exceptions applies. *Thompson v. Koehane*, 516 U.S. 99,109-10 (1995). Because resolution depends heavily on the trial court's appraisal of witness credibility and demeanor, juror impartiality is a factual issue that falls within the statutory presumption of correctness. *Id.* The majority contends that the trial court was so lax in its investigation of Freeland that its determination that Freeland was impartial is not entitled to the presumption of correctness. I disagree.

The state trial court made findings that Freeland's answers on voir dire were not dishonest or intentionally misleading. At the in camera hearing, the trial court had an adequate opportunity to witness Freeland's demeanor and questioned her about her understanding of the circumstances surrounding her brother's death and whether she believed it would affect her partiality. The trial court refused to "characterize anything [Freeland] did or did not do as demonstrating any lack of candor." Also, the trial court found that Freeland's allegedly false answers to the two voir dire questions at issue were "inadvertent" and were given in "good faith."

Absent application of a statutory exception, we must give presumptive weight to the finding of Freeland's impartiality. The majority refuses to apply the presumption because, they believe, (1) material facts were not developed, and (2) clear and convincing evidence

demonstrates that the state court's determination as to Freeland's honesty was erroneous. I disagree.

The majority concludes that material facts about Richard's death were not developed adequately at the trial court proceeding. However, the trial court found Freeland honestly believed that her brother's death was an accident, and therefore was not a crime. This finding is not inconsistent with Freeland and Richard being close, the fact that the family was seriously affected by his death, or even institution of a wrongful death suit and eventual recovery. Similarly, that Freeland's mother testified in the criminal proceedings is of no import since it was not shown that Freeland knew about this testimony. Therefore, like the majority of the original Ninth Circuit panel, I would not disrupt the state courts' determination that Freeland answered honestly based on evidence unknown to the state trial judge that is wholly consistent with such a finding.

The majority assumes that Freeland obviously lied by failing to reveal that she was attacked by her cousin, that her father had been arrested for kidnapping, that her uncle had been arrested for murder, that her brother had been arrested on drug charges, that Freeland's cars and home had been burglarized, and that her former husband had been arrested for rape. However, as to each of these additional facts, Freeland has explained why she originally failed to disclose them. The district court explicitly credited Freeland's testimony and found that the new evidence did not detract from the state courts' findings about Freeland's credibility.

The procedural history of this case illustrates that Freeland's credibility was thoroughly scrutinized on multiple occasions. First, the state trial court held an in camera hearing between the guilt and penalty phases and

concluded that Freeland was not biased. A motion for mistrial was then denied. Second, the state trial court held a hearing on this issue in response to Dyer's motion for a new trial. The trial court found that the voir dire questions were ambiguous and that Freeland's responses were inadvertent. Third, on direct appeal, the California Supreme Court agreed that the questions were ambiguous and found no evidence that Freeland was lying when she said that no member of her family had been a crime victim. Fourth, on federal habeas, the district court conducted an evidentiary hearing accepting new evidence and still affirmed the trial court's finding that Freeland had answered honestly, refusing to presume bias.

Accordingly, we have before us not just the state courts' findings of impartiality, but also the district court's findings that are based on the additional facts that Dyer had since proffered and on which the majority now focuses its attention. As the district court found, none of these additional facts provides any reason to disturb the state courts' finding that Freeland was honest in her responses. *See Nix v. Williams*, 467 U.S. 431, 449-50, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (newly discovered evidence failed to demonstrate that facts were not adequately developed in state court). None of the district court's findings as to Freeland's credibility were clearly erroneous. Although the number of crimes committed by members of her family seems high, and the number of incidents in which she or members of her family were victims of crimes also seems high, these facts do not establish that Freeland was dishonest. Freeland is from a crime-ridden community--a fact which plausibly both affects her understanding of what qualifies as a crime and influenced her answers to Questions 13 and 15. The trial court and the state supreme court both found the voir dire questions ambiguous and that Freeland's answers in camera and in deposition were honest. The record as a

whole, including Freeland's deposition testimony and her responses at the in camera hearing, is adequate to support the findings that she was not being dishonest during voir dire. Therefore, the additional facts do not destroy the presumption that the state courts' findings of fact are correct.

The majority rejects the state courts' factual findings and instead concludes that Freeland's responses were patently implausible. To reach this conclusion they continually recite their assumption that "Freeland lied and lied repeatedly." Essentially, the majority is re-finding the facts and, through speculation and assumption regarding these newly-found facts, concluding that Freeland's explanations defy common sense. That is not our proper function. The trial court saw Freeland testify and simply did not believe that she lied. Our judicial system relies heavily on the trial judge to make this very sort of determination. Trial judges, viewing the testimony first hand and, using all their senses, are in the best position to determine credibility. For this reason, appellate judges properly defer to the trial judge's factual findings of credibility under our laws. *See Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.1986) (stating that "[w]e can think of no sort of factual finding that is more appropriate for deferential treatment than is a state court's credibility determination."). As the majority of the prior three judge panel concluded, "[s]imply put, while there are substantial questions raised as to her credibility, the findings by the state trial court, added to by the findings of the district judge, have not been demonstrated by Dyer to be clearly erroneous--given the special credibility deference we are required to apply: she believed what she said was true at that time." *Dyer v. Calderon*, 122 F.3d 720, 730 (9th Cir.1997). Actual bias is the issue here; not whether she lied on the juror questionnaire or voir dire. *See McDonough*, 464 U.S. at 556.

II. Implied Bias

Not only does the majority find actual bias, based on the assumed lie, but they also find implied bias based on the circumstances. The Supreme Court has never explicitly held that we may infer or presume bias based on the totality of the circumstances. We should not do so now.

The majority relies on case law where we have said that "bias could be implied or presumed from the 'potential for substantial emotional involvement, adversely affecting impartiality,' inherent in certain relationships." *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir.1990) quoting *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977). However, these cases are inapplicable to today's case. In those cases the court found that the relationship of a juror to the subject of the trial was too close. In *Allsup*, we held that two jurors in a bank robbery trial were partial despite the district court's finding of impartiality because the jurors were employees of a different branch of a bank that was robbed. *Allsup*, 566 F.2d at 71. Similarly, in *United States v. Eubanks*, 591 F.2d 513 (9th Cir.1979), a heroin conspiracy trial, we presumed bias where a juror did not disclose that two of his children were in prison for heroin-related crimes. *Id.* at 516-17. In this case, there is no such relationship. In order for Freeland to have the necessary relationship to create the emotional involvement she would have had to know and understand the circumstances and facts of her brother's death to be a brutal murder. To the contrary, Freeland believed her brother's death was an accident. Accordingly, she would have no impermissible substantial emotional involvement to Dyer's case.

The majority contends that this is such an extreme and extraordinary case that we must presume bias. They claim that Freeland must be presumed partial because

Freeland's brother was shot several times in the head, just as the victims in this case. It is true that on rare occasions, "[c]ourts have been willing to presume bias where a juror or his close relatives have been personally involved in a situation involving a similar fact pattern." *Tinsley*, 895 F.2d at 528 (citing cases). However, as stated in our discussion of actual bias, we accept the trial court's finding that Freeland honestly believed that her brother had been killed accidentally. That said, the remaining similarity--death by gunshot--does not render this case extraordinary or extreme.

While at first glance it may appear extraordinary that Freeland has experienced such tragedy and so much crime, considering the alleged rate of crime in Freeland's neighborhood, her circumstances, though lamentable, are not surprising or extraordinary. Indeed, Freeland has experienced crime not only as a victim but also as the family member of criminals. Thus, it would be pure speculation to say that there was an inherent "potential for substantial emotional involvement, adversely affecting impartiality." *Id.* at 527 (internal quotation omitted).

The majority would go further, however. Now, sixteen years after the trial, they would conduct in the appellate court an inquiry similar to a perjury trial to impeach the former juror Freeland when in fact the state trial court conducted a face-to-face hearing at the time that the issue of Freeland's bias was raised.

Finally the majority's holding requiring this "perjury inquiry" to sustain an implied bias finding is clearly a new rule barred by *Teague*, and I join and concur in Judge O'Scannlain's dissent which ably sets forth the *Teague* application in this case.

I would affirm the district court's denial of the writ of habeas corpus.

O'Scannlain, Circuit Judge, with whom Brunetti, Thompson, and Kleinfeld, Circuit Judges, join, dissenting.

I respectfully dissent from the majority's holding that we are not foreclosed by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), from declaring that the entire hierarchy of California courts committed constitutional error by not implying juror bias.[1]

State court judges are our co-equal partners in the protection of federal constitutional rights.[2] Although Congress has granted us the authority to grant habeas corpus relief to state prisoners, due consideration of our circumscribed role in the federal system counsels prudent restraint in exercising that extraordinary power to second-guess state courts. Lest we forget, in *Teague*, the Supreme Court instructed us not to impose constitutional rules on our state court brethren that were not compelled by existing precedent when a habeas petitioner finished raising his claims on direct review. As the Court explained in *Gilmore v. Taylor*, 508 U.S. 333, 113 S.Ct. 2112, 124 L.Ed.2d 306 (1993), *Teague* "'validates reasonable, good-faith interpretations of existing precedents made by

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1. For the reasons expressed in Judge Brunetti's dissent, I would also accord the presumption of correctness to the factual findings made by the state trial court, and conclude that Juror Freeland was not shown to be actually biased. I would, therefore, affirm Judge Walker's denial of the petition for writ of habeas corpus.

2. See *Robb v. Connolly*, 111 U.S. 624, 637, 4 S.Ct. 544, 28 L.Ed. 542 (1884) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States....").

state courts,' and thus effectuates the States' interest in the finality of criminal convictions and fosters comity between federal and state courts." *Id.* at 340 (quoting *Butler v. McKellar*, 494 U.S. 407, 414, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990)) (internal citation omitted).

Under *Teague*, the reviewing federal court must inquire whether "'a state court considering [the petitioner's] claim at the time his conviction became final would have felt *compelled by existing precedent* to conclude that the rule [he] seeks was required by the Constitution.'" *Lambrix v. Singletary*, 520 U.S. 518, 117 S.Ct. 1517, 1524, 137 L.Ed.2d 771 (1997) (quoting *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990)) (emphasis added). That is to say, in order to conclude that application of a rule is not barred by Teague, the federal court must determine not only that the rule was "a reasonable interpretation of prior law," or even the "most reasonable" interpretation, but also that "no other interpretation was reasonable." Id. at 1530. Because state courts would not have felt compelled by precedent (existing on the date Dyer's conviction became final) to conclude that the "implied-bias rule" developed by the majority was required by the Constitution, application of that rule is barred by *Teague*.

I

In *Teague*, the Supreme Court held, "[s]ubject to two narrow exceptions," *Gilmore v. Taylor*, 508 U.S. 333, 339, 113 S.Ct. 2112, 124 L.Ed.2d 306 (1993), that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310. The federal court's inquiry under *Teague* must be conducted in three steps. First, the federal court must determine the date on which the petitioner's conviction

became final. *See Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994). Second, it must "[s]urvey the legal landscape as it then existed," *Graham v. Collins*, 506 U.S. 461, 468, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), to "determine whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Saffle*, 494 U.S. at 488. Finally, "if the court determines that the habeas petitioner seeks the benefit of a new rule, the court must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity."[3] *Lambrix*, 117 S.Ct. at 1524-25.

Dyer's conviction became final on October 31, 1988, the date on which the United States Supreme Court declined to review the California Supreme Court's decision affirming Dyer's conviction on direct review. *See People v. Dyer*, 45 Cal.3d 26, 246 Cal.Rptr. 209, 753 P.2d 1, *cert. denied*, 488 U.S. 934, 109 S.Ct. 330, 102 L.Ed.2d 347 (Oct. 31, 1988).

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3. The first "limited" exception to *Teague* applies to new rules " 'forbidding criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.' " *O'Dell v. Netherland*, --- U.S. ----, ----, 117 S.Ct. 1969, 1973, 138 L.Ed.2d 351 (1997) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)). The second, "even more circumscribed," exception applies to " 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.' " *Id.* (quoting *Graham*, 506 U.S. at 478). As the Supreme Court observed in *Graham*, "[w]hatever the precise scope of this [second] exception, it is clearly meant to apply only to a small core of rules requiring observance of those procedures that ... are implicit in the concept of ordered liberty." *Graham*, 506 U.S. at 478. The majority does not suggest that either of these exceptions applies here.

In surveying the legal landscape as it existed on that date, it is necessary to determine whether "precedent" would have "compelled" a state court to conclude that the Constitution "required" the implied-bias rule applied by the majority. *Saffle*, 494 U.S. at 488. The majority purports to rely on three sources of precedent in support of its conclusion that juror bias may be implied: (1) decisions of the United States Supreme Court; (2) decisions of the lower federal courts; and (3) the common law.

II

Our survey of the decisions of the Supreme Court begins with *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). In *Smith*, the Court examined whether a habeas petitioner's right to an impartial jury had been violated because a juror submitted an application for employment as an investigator in the District Attorney's Office during the petitioner's trial. See id. at 212. The petitioner argued that "[g]iven the human propensity for self-justification ... the law must impute bias to jurors in [such a] position." *Id.* at 215. The Supreme Court "disagree[d]," explaining that it had "long held that the remedy for allegations of juror partiality is a hearing in which the defendant has an opportunity to prove actual bias." *Id.*; *see also id.* at 215-17 (discussing *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981), *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), and *Dennis v. United States*, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950)).

Justice O'Connor concurred in the Court's opinion in *Smith*. Justices Marshall, Brennan, and Stevens dissented. The concurring and dissenting Justices disagreed as to whether the Smith majority had in fact precluded the possibility that an implied-bias rule is required by the Constitution. In her concurring opinion, Justice O'Connor

wrote "to express [her] view that the [majority] opinion does not foreclose the use of 'implied bias' in appropriate circumstances." *Id.* at 221 (O'Connor, J., concurring). However, Justice Marshall, joined by Justices Brennan and Stevens, expressed a different view of the majority opinion: "According to the majority, *the Constitution requires only that the defendant be given an opportunity to prove actual bias.*" *Id.* at 228 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting) (emphasis added).

For *Teague* purposes, it matters little whether Justice O'Connor or the dissenting Justices in *Smith* arrived at the correct interpretation of the majority opinion; what does matter, quite simply, is that reasonable jurists could disagree. I posit what should be considered a most unremarkable point: Justices Marshall, Brennan, and Stevens are reasonable jurists. Because they could read a majority opinion of the United States Supreme Court as precluding the possibility of a constitutional implied-bias rule, I cannot conclude, unlike my majority colleagues, that all reasonable jurists would be compelled to locate such a rule in the Constitution.[4]

Would reasonable jurists have been compelled to change their minds between 1982, when *Smith* was decided, and October 31, 1988, when Dyer's conviction

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4. I strongly disagree with the majority's contention that "*Smith* has no bearing on our case unless we assume the majority tacitly did what Justice Marshall accused it of doing." Maj. Op. at 8602. Rather, *Smith* "has no bearing on our case" *only if* Justice Marshall's position was unreasonable. That it was not unreasonable is demonstrated by the fact that many other reasonable jurists have since joined Justice Marshall in reading *Smith* to hold that the Constitution requires only that defendants be given an opportunity to prove actual bias. *See, e.g., United States v. Malloy*, 758 F.2d 979, 981-82 (4th Cir.1985); *Irons v. Lockhart*, 741 F.2d 207, 208 (8th Cir.1984); *Rogers v. McMullen*, 673 F.2d 1185, 1189 (11th Cir.1982).

became final? To answer this question, we first look to the Supreme Court's decision in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). In *McDonough*, a four-Justice plurality stated that, in order to obtain a new trial on account of juror bias, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. In a concurring opinion, Justice Blackmun, joined by Justices Stevens and O'Connor, observed that the plurality opinion did not "foreclose" the possibility that bias may be implied. *Id.* at 556 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring). In yet another concurring opinion, Justice Brennan, joined by Justice Marshall, expressed disagreement with the plurality's analysis, arguing that courts may consider whether there are "any facts in the case suggesting that bias should be conclusively presumed." *Id.* at 558 (Brennan, J., joined by Marshall, J., concurring).

State courts would not have felt compelled by these concurring opinions to conclude that bias may be implied as a matter of federal law. The *McDonough* Court reversed the Tenth Circuit's holding that a new trial was required on account of juror bias, *see McDonough*, 464 U.S. at 549; therefore, the statements in both concurring opinions regarding implied bias were dicta not necessary to the holding. *See United States v. Boatwright*, 822 F.2d 862, 864 (9th Cir.1987) (Kennedy, J.) ("The requirement [in *United States v. Echegoyen*, 799 F.2d 1271 (9th Cir.1986)], that two independent searches be in progress [for the challenged evidence to be admitted] is dictum, as the case admits the challenged evidence."); *Hutchinson v. Amateur Elec. Supply*, 42 F.3d 1037, 1047 (7th Cir.1994) ("Any authority for denying prejudgment interest in [*Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d 402 (7th

Cir.1989)] thus is dicta, since the Donnelly court reversed the district court's denial of interest."); *United States v. Helmsley*, 985 F.2d 1202, 1207 (2d Cir.1993) ("The statement in [*Mills v. Scully*, 826 F.2d 1192 (2d Cir.1987), regarding potential deprivations of due process] was dictum since *Mills* reversed the grant of a writ of a habeas corpus."). Dicta in Supreme Court opinions are not binding, see *McDaniel v. Sanchez*, 452 U.S. 130, 141, 101 S.Ct. 2224, 68 L.Ed.2d 724 (1981); *Ayala v. United States*, 550 F.2d 1196, 1200 (9th Cir.1977), and are certainly insufficient to compel state courts to conclude that a rule is required by the Constitution under *Teague*. *See Lambrix*, 117 S.Ct. at 1525 (authority that supports point "in dictum" does not " 'control[ ]' or 'dictate[ ]' the result" for *Teague* purposes).

Between its decision in *McDonough* and 1988, the Supreme Court did not directly address the issue of implied bias. Thus, the decisions of the Supreme Court could not have "compelled" state courts to conclude that the Constitution requires the majority's implied-bias rule.[5]

III

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5. This conclusion is not affected by the Supreme Court's statement in *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), that the application of a rule is not barred by *Teague* when it emerges not "from any single case ... but from [a] long line of [Supreme Court] authority...." *Id.* at 232. No such "long line" of Supreme Court authority compelled jurists to recognize the majority's implied-bias rule at the time Dyer's conviction became final. *Id.* If such a "long line" ever existed (it did not exist, see *Smith*, 455 U.S. at 215-17 (collecting cases)), it certainly was severed by *Smith*. *See Saffle*, 494 U.S. at 488 (*Teague* asks whether state court would have felt compelled by "*existing* precedent.") (emphasis added).

The majority would apparently hold that, irrespective of whether there is a "Supreme Court case announcing" a constitutional rule of criminal procedure, the rule is not barred by *Teague* if it is "so deeply embedded in the fabric of due process that everyone takes it for granted." Maj. Op. at 8601. I am unable to agree. A rule is "new" under *Teague* unless "a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [the petitioner] seeks was required by the Constitution." *O'Dell*, --- U.S. at ----, 117 S.Ct. at 1973 (holding that rule is not "new" only if this standard is met); *Lambrix*, 117 S.Ct. at 1524 (using same language to describe standard); *Caspari*, 510 U.S. at 390 (same); *Saffle*, 494 U.S. at 488 (same). As the Supreme Court's repeated formulation of the *Teague* inquiry has made clear, *Teague* asks not only (1) whether a rule is required by (or deeply embedded in)[6] the Constitution, but also (2) whether existing precedent compelled that conclusion at the time the petitioner's conviction became final.

By "existing precedent," the Court could not have meant the Constitution itself. Otherwise, the *Teague* inquiry would not only be rendered circular (that is, *Teague* would ask whether "the Constitution compelled the conclusion that the rule the petitioner seeks is required by the Constitution"), but also toothless. Even if a rule was not compelled by Supreme Court decisions, a federal court would always be able to circumvent *Teague* simply by concluding that the rule had always been "deeply embedded in the fabric" of the Constitution. (Indeed, it is

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6. It is unclear whether the majority would create a separate *Teague* inquiry for rules that are "deeply embedded in" the Constitution, as opposed to those that are merely "required by" the Constitution. Such a distinction is entirely without support in the Supreme Court's *Teague* jurisprudence.

the rare case in which a federal court applies a constitutional rule of criminal procedure that the court does not believe to be "deeply embedded in the fabric" of some constitutional provision, or combination thereof.) If the Supreme Court had intended the result reached by the majority, it would simply have omitted the words "by existing precedent" from the *Teague* inquiry, and would have stated that a rule is not barred by *Teague* if state courts would "have felt compelled [ ] to conclude that the rule the petitioner seeks was required by the Constitution."[7] But *see Saffle*, 494 U.S. at 488 (*Teague* asks whether state courts would "have felt compelled by existing precedent to conclude that the rule [the petitioner] seeks was required by the Constitution.") (emphasis added).

Even if there were a "deeply-embedded-in-the-fabric" exception to *Teague*, the Supreme Court's summary of its juror-bias decisions in *Smith v. Phillips* makes it clear that

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7. The majority's argument that no reasonable jurist would fail to impute bias automatically to the majority's parade of horrible jurors (the mother of one of the victims, Dyer's ex-wife, the District Attorney, etc.), *see* Maj. Op. at 8603, is flawed for two reasons. First, irrespective of whether they had all "sworn to be fair," *id.*, these hypothetical jurors (unlike Juror Freeland) clearly would not have survived application of California's own juror bias laws. *See Weathers v. Kaiser Found. Hosp.*, 5 Cal.3d 98, 110 & n. 5, 95 Cal.Rptr. 516, 485 P.2d 1132 (1971) (intentional concealment on voir dire constitutes grounds for new trial). Lest we forget, we sit as a federal court in habeas review of the California courts, which found no bias (as a matter of either state or federal law) in this case.

Even in the unlikely event that, as the majority suggests, the federal Constitution itself requires courts to impute bias to jurors (in the absence of a showing of intentional concealment), we are nonetheless barred by *Teague* from applying an implied-bias rule unless *existing precedent* compelled that rule at the time Dyer's conviction became final. The majority simply fails to point to *any* such compelling precedent.

it would not apply here. The *Smith* Court stated, in pertinent part:

> In argument before this Court, respondent ... contends that a court cannot possibly ascertain the impartiality of a juror by relying solely upon the testimony of the juror in question. Given the human propensity for self- justification, respondent argues, the law must impute bias to jurors in Smith's position. We disagree.
>
> This court has *long held that the remedy* for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove *actual bias*. For example....

Smith, 455 U.S. at 215 (emphasis added). Significantly, the Smith Court then proceeded to support this view by summarizing the Court's juror-bias jurisprudence, including its decisions in *Dennis v. United States*, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950), *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), and *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981).[8] Even if the majority's historical sketch of juror-bias cases were somehow more accurate than that provided by the *Smith* Court (I respectfully submit that it is not), reasonable state judges sitting in 1988 were entitled to rely on the *Smith* majority's interpretation of precedent for the proposition that implied bias is not constitutionally required. Such state judges certainly could not have been expected to foresee

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8. As its discussion of these juror-bias cases demonstrates, the *Smith* Court's statement that it had "long held that the remedy for allegations of juror partiality is [an actual bias hearing]," *id.* at 215, was not limited to any particular factual situation.

our own interpretation of that precedent, decreed a decade later in 1998!

The majority's contention that "[n]o opinion in the two centuries of the Republic-except the dissent in our case-has suggested that a criminal defendant might lawfully be convicted by a jury tainted by implied bias," Maj. Op. at 8603, is beside the point for three reasons. First, even assuming that the Supreme Court *had not said* that "the Constitution *does not require* an implied- bias rule," it certainly does not follow that the Court *has said* that "the Constitution does require an implied-bias rule"; only the second proposition is important under *Teague*. Second, while no court has uttered the precise words used by the majority, many reasonable jurists have concluded, in light of existing precedent, that defendants must demonstrate actual bias to obtain a new trial. *See, e.g., Irons v. Lockhart*, 741 F.2d 207, 208 (8th Cir.1984) ("In *Smith v. Phillips* ... the Supreme Court held that a petitioner who seeks habeas corpus relief based on an allegation of juror bias must prove actual bias, either in a state court or federal court hearing, and that a court cannot impute bias based on the petitioner's bare allegations."); *Rogers v. McMullen*, 673 F.2d 1185, 1189 (11th Cir.1982) ("The Supreme Court [in *Smith v. Phillips*] rejected the implied bias argument and held that due process requires only that a defendant have the opportunity at a post-trial hearing to prove actual bias."); *United States v. Whiting*, 538 F.2d 220, 223 (8th Cir.1976) ("Where an attack is made upon the integrity of the trial by reason of alleged misconduct on the part of a juror in failing to disclose information pertinent to the issue of prejudice, the defendant's burden of proof must be sustained not as a matter of speculation, but as a demonstrable reality. No demonstration of intentional or knowing withholding of information by [the juror] is made here."). Finally, contrary to what the majority suggests,

nowhere does this dissent take a position on whether the Constitution actually requires an implied-bias rule; rather, it simply observes that reasonable jurists could conclude that such a rule was not required at the time Dyer's conviction became final.

Buried beneath the majority's "fabric of due process" lies one relevant enduring fact. That is, Supreme Court precedent did not compel the conclusion that an implied-bias rule was required by the Constitution at the time Dyer's conviction became final. *Cf. Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir.1990) ("The Supreme Court has never explicitly adopted or rejected the doctrine of implied bias.").

IV

We next examine whether, as of the date Dyer's conviction became final, the decisions of the lower federal courts would have compelled state courts to conclude that an implied-bias rule was constitutionally required. Because a state court could reasonably have concluded--and perhaps should have concluded--that it was not bound by any lower federal court's interpretation of the United States Constitution on any matter, it follows a fortiori that lower federal court decisions would not have bound that state court with respect to the specific question of implied bias.

As of 1988,[9] at least three federal courts of appeals

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9. We must determine whether a state court would have felt bound by lower federal court decisions based upon a reasonable interpretation of existing precedent at the time Dyer's conviction became final. To hold a decade after the fact that state courts were bound by precedent that reasonable jurists would not have viewed as binding would be to turn Teague on its head. As the Supreme Court

had concluded that, with respect to the interpretation of federal law, state courts are bound only by the decisions of the United States Supreme Court, and not by the decisions of the lower federal courts.[10] *See Bromley v. Crisp*, 561 F.2d 1351, 1354 (10th Cir.1977) ("[T]he Oklahoma Courts may express their differing views on the retroactivity problem or similar federal questions until we are all guided by a binding decision of the Supreme Court."); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1074 (1972) ("The federal Circuit Courts of Appeals and, in respect to federal law, the state courts of last resort, are subject to the supervisory jurisdiction of the Supreme Court of the United States. They are, however, as to the laws of the United States, co-ordinate courts.") (quoting *Iowa Nat'l Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445, 454 (1930)); *Owsley v. Peyton*, 352 F.2d 804, 805

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stated in *O'Dell v. Netherland*, --- U.S. ----, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997), "[a]t bottom, ... the Teague doctrine 'validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.' " *Id.* at 1973 (quoting *Butler v. McKellar*, 494 U.S. 407, 414, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990)). It follows that *Teague* "validates reasonable, good- faith interpretations of existing precedents" concerning the binding effect of "existing precedents." *Butler*, 494 U.S. at 414.

10. In *Yniquez v. Arizona*, 939 F.2d 727 (9th Cir.1991), decided three years after Dyer's conviction became final, we stated in dicta that "[d]espite the authorities that take the view that the state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view." *Id.* at 736. However, in vacating our later decision in that case, the Supreme Court characterized our discussion of the binding effect of lower federal court decisions on state courts as "remarkable." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S.Ct. 1055, 1064 n. 11, 137 L.Ed.2d 170 (1997) (citing *Lockhart v. Fretwell*, 506 U.S. 364, 375-76, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (Thomas, J., concurring) (Supremacy Clause does not require state courts to follow rulings of federal courts of appeals on questions of federal law)).

(4th Cir.1965) ("Though state courts may for policy reasons follow the decisions of the Court of Appeals whose circuit includes their state, they are not obliged to do so.") (internal citation omitted). Although the Supreme Court had, as of 1988, neither adopted nor rejected this position, several individual Justices had expressed a similar view. *See Steffel v. Thompson*, 415 U.S. 452, 482 n. 3, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (Rehnquist, J., joined by Burger, C.J., concurring); *Perez v. Ledesma*, 401 U.S. 82, 125, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971) (Brennan, J., joined by White and Marshall, JJ., dissenting).

Further, a substantial majority of the state courts that had addressed this issue, including California's, had concluded that they were not bound by the decisions of the lower federal courts on federal questions. Compare, *e.g., Cowan v. Myers*, 187 Cal.App.3d 968, 985, 232 Cal.Rptr. 299 (1986) ("[T]he decisions of the lower federal courts, even on federal questions, are not binding on this court."); *State v. Webster*, 114 Wis.2d 418, 426 n. 4, 338 N.W.2d 474 (1983); *State v. Glover*, 60 Ohio App.2d 283, 287, 396 N.E.2d 1064 (1978); *Greene v. State*, 11 Md.App. 106, 110, 273 A.2d 830 (1971), with *Handy v. Goodyear Tire & Rubber Co.*, 230 Ala. 211, 160 So. 530 (1935); *Kuchenmeister v. Los Angeles & S.L.R.*, 52 Utah 116, 172 P. 725 (1918). In light of this line of authority, a state court could reasonably have concluded that it was not bound by the decisions of any lower federal court on any federal constitutional issue. Accordingly, such lower federal court decisions could not "compel" state courts within the meaning of *Teague*. Compare *Clemmons v. Delo*, 124 F.3d 944, 955 n. 11 (8th Cir.1997) (assuming without deciding that "when the [Supreme] Court says 'firmly dictated by precedent,' it means Supreme Court precedent"); *Glock v. Singletary*, 65 F.3d 878, 885 (11th Cir.1995) (en banc) (courts of appeals do not "dictate" particular rule to state courts for *Teague* purposes), with

Jiminez v. Myers, 40 F.3d 976, 979-81 (9th Cir.1994) (using Ninth Circuit decisions to support conclusion that "totality of the circumstances" rule was not "new" under *Teague*). For this reason, the majority errs in relying upon *United States v. Burr*, 25 F. Cas. 49, 50 (D.Va.1807), a federal district court opinion, for the proposition that Teague is inapplicable.

Indeed, even assuming that all reasonable state court judges would have concluded, contrary to the weight of the authority, that they were bound to follow lower federal court precedent, *Teague* would still dictate that such judges were not compelled to recognize an implied-bias rule. At the time Dyer's conviction became final, the federal courts of appeals were split on the issue of implied bias. Compare *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir.1979) (holding that bias could be implied as a matter of law), with *United States v. Malloy*, 758 F.2d 979, 982 n. 6 (4th Cir.1985) (rejecting implied-bias theory and collecting cases in which other lower federal courts had done so); see also *Debtor Reorganizers, Inc. v. State Bd. of Equalization*, 58 Cal.App.3d 691, 696, 130 Cal.Rptr. 64 (1976) ("As between the decisions of the Ninth Circuit and [those] of the Fifth Circuit [on federal law], no primacy inheres in the former, so the persuasiveness of the conflicting views must depend upon the validity of the arguments made therein."). A state court judge sitting in 1988 could reasonably have followed those lower federal courts that had held that a defendant must establish actual bias to obtain a new trial; perforce, state court judges were not compelled to adopt the implied-bias rule. *See Lambrix*, 117 S.Ct. at 1530 ("[Teague asks] whether no other interpretation [of existing precedent] was reasonable.").

V

As of the time Dyer's conviction became final, the conclusion that an implied- bias rule was required by the Constitution was not compelled by either: (1) the decisions of the Supreme Court; or (2) the decisions of the lower federal courts.

Today the court holds that there is a third source of compelling authority: Sir Edward Coke's dictum in *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (C.P.1610).[11] See Maj. Op. at 8601. Not likely! Our own Supreme Court has stated that "authority that supports the point in dictum" does not " 'control[ ]' or 'dictate[ ]' the result" under Teague. See Lambrix, 117 S.Ct. at 1525. The Court could hardly have intended an exception to this Teague-based rule, which applies even to the Court's own

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11. The majority opinion states:

> In the common law, implied bias can be traced all the way back to Sir Edward Coke's dictum in *Bonham's Case* that no man shall be judge in his own cause. *See Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (C.P.1610). This pedigree neatly disposes of the state's argument that implied bias would be a "new rule" barred by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Implied bias may indeed be the single oldest rule in the history of judicial review, as *Bonham's Case* is often identified as the first case in which a court struck down a duly enacted legislative act. *See, e.g., Suzanna Sherry, The Founders' Unwritten Constitution*, 54 U. Chi. L.Rev. 1127, 1130 (1987).

Maj. Op. at 8601. No matter how "old[ ]" such a "rule," id., state courts could not have been compelled by precedent to conclude that it was required by the Constitution. *See Lambrix*, 117 S.Ct. at 1524. The list of "old rules" whose application by state courts is not compelled by precedent (holding that such rules are constitutionally required) may be limitless, e.g.: The Ten Commandments, *see* Exodus 20:7-17; "If a man destroy the eye of another man, they shall destroy his eye," Hammurabi's Code § 196 (c. 1700 B.C.); and "Do unto others as you would have them do unto you," Matthew 7:12.

opinions, for the dictum of a seventeenth-century English common-law judge.

I respectfully dissent.

Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED R. DYER,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden,
Respondent-Appellee.

No. 95-99002

D.C. No. CV-89-03454-VRW

ORDER AND OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Argued and Submitted
December 14, 1995—Pasadena, California

Filed May 5, 1997
Amended August 19, 1997

Before: J. Clifford Wallace, Betty B. Fletcher, and Melvin Brunetti, Circuit Judges

Opinion by Judge Wallace

Dissent by Judge Fletcher

COUNSEL

Jon B. Streeter, Orrick, Herrington & Sutcliffe, San Francisco, California, for the petitioner-appellant.

Dane R. Gillette, Deputy Attorney General, San Francisco, California, for the respondent-appellee.

OPINION

WALLACE, Circuit Judge:

Dyer, a California state prisoner under sentence of death, appeals from the district court's denial of his petition for writ of habeas corpus relief under 28 U.S.C. § 2254. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. §§ 1291 and 2253. We affirm.

I

On November 8, 1980, Dyer (armed with a .38 caliber handgun), Michael Jackson (Dyer's stepbrother), and Cleveland Ario (armed with a .45 caliber semiautomatic pistol) drove to the home of their friend, Belinda Murray. She lived in a two-level apartment in Oakland, California, along with her brother Floyd, her friend Nora Fluker, and Fluker's four children. Dyer, Jackson, and Ario brought cocaine and a bottle of wine, which they drank.

Some time later, Belinda Murray's friend, Bennie Warren, arrived. Warren had never met Dyer before, but found him to be "stable-minded," "intelligent," and entirely in control of himself. Later, Belinda Murray, Dyer, Jackson, and Ario went upstairs to Belinda's bedroom. Warren was told to stay downstairs. Once upstairs, Ario injected Belinda Murray, Dyer, and himself with a "speedball"--a mixture of heroin and cocaine. Jackson and Fluker also used the drugs. Dyer appeared to have received a small dose, which had no apparent effect on him.

Dyer, Jackson, and Ario then left Belinda Murray's apartment. Belinda and Warren also left, returning later with gum, cigarettes, and a bottle of wine. At that time, Floyd Murray was upstairs with Fluker's sleeping children. Dyer, Jackson, and Ario returned approximately midnight. The three went upstairs with Belinda Murray and Warren to Belinda's bedroom, where Dyer, Jackson, and Ario again injected themselves with drugs. Dyer then laid down on Belinda's bed, covered his eyes with his arm, and rested. Ario gave his .45 caliber gun to Belinda Murray, and she placed it in the closet. Warren left the apartment soon thereafter, and Jackson and Ario followed.

Dyer arose after about five minutes and appeared startled. He noticed that his rings were missing and asked Belinda Murray if his stepbrother Jackson had removed them from his fingers. Belinda told Dyer that she did not know, but said that Warren had been nearby when he fell asleep. Dyer concluded that Warren must have taken his rings. Dyer told Belinda to give him Ario's gun, which he stuck inside his pants along with his own .38 caliber pistol. Dyer then asked Belinda to accompany him through the housing project in search of Warren so he could locate his missing rings.

Dyer conversed with Belinda Murray as they walked. He appeared angry, but not intoxicated. He told her that he was going to kill Warren if he found him that evening and if not, he was going to "whip his ass" once he did.

When Belinda Murray and Dyer returned, Belinda went upstairs while Dyer sat downstairs on the couch. Belinda heard a knock on the door and, looking out her bathroom window, saw Warren standing at the front door. Belinda rushed downstairs and found Dyer pistol-whipping Warren on the head with both guns. Warren's face was bloody and he was almost unconscious. Dyer demanded that Warren return his rings. Warren denied having them and Dyer told him, "You better pray my brother has my rings." At all times during the beating, Dyer appeared angered, but in control of himself.

Within minutes, Jackson and Ario arrived. Jackson asked Dyer what was the matter. Dyer, with a gun in each hand, pushed Jackson away. Jackson, upset by Dyer's act, left the apartment. Belinda Murray and Fluker followed Jackson outside and quieted him down. When Jackson came back inside, Dyer gave him one of the guns and Jackson immediately became violent. He pushed both Belinda Murray and Fluker and told them not to move. Upon Dyer's command, Ario searched Warren, but did not find Dyer's rings. During the search, Dyer kept his gun pointed at Warren and told him he was "a dead man."

Upon hearing Dyer's threat, Ario told Dyer that if he killed one of them he would have to kill the others as well. Dyer replied, "Man, I'm not killing no babies." Ario then went upstairs to get Floyd Murray. Jackson marched at gunpoint the four captives--Fluker, Warren, Belinda, and Floyd Murray--into the back seat of a car. Dyer joined Jackson and Ario in the front seat.

The four hostages urged whomever took the rings to return them. No one, however, admitted to having the rings. Jackson finally turned around, gun in hand, and ordered them to "shut up." Ario said that they should "kill that bitch first," referring to Belinda Murray. During the ride, Floyd Murray asked Dyer several times, "Why do you want to take me out?" Dyer told him to "shut up" and stuck his gun in Floyd's face.

After about ten minutes, the car stopped and Dyer said, "Get out." Dyer pointed the .45 caliber weapon at the four hostages and instructed them to walk straight ahead. Jackson ordered them to lie face down on the ground. Before lying down, Belinda Murray saw that Dyer still had a gun.

After she lay down, Belinda looked up and could see "the fire coming" as the first shot was fired. She threw her arms up over her head and passed out.

Although ordered to lie face down, Floyd Murray remained on his knees. Warren (who had been a member of the National Rifle Association since age 13 and was very familiar with guns) then heard three shots from the .38 caliber revolver come from his left, where Belinda Murray was lying. He then heard scuffling noises, as if someone was being beaten. Someone said, "This bitch ain't dead yet." Warren heard a few more shots and heard someone say, "If she's not dead now, she'll be dead by morning." Warren thought the additional shots also came from the .38 revolver.

Warren next heard shots from the .45 caliber gun, followed by more scuffling. He heard someone walk toward him, looked up, and saw Dyer holding the .45 about a foot away from Fluker. Dyer fired three shots;

each time a bullet entered Fluker's body, Warren "could feel her fluttering and jumping."

Dyer then stepped in front of Warren, who got up on his knees. He pointed the gun at Warren's head and fired. Warren flipped over backwards and, before losing consciousness, heard someone say, "If they're not dead now, they'll be dead by morning," and someone else say, "check their pulse."

When Belinda Murray regained consciousness, she felt someone taking her pulse and heard him say, "The bitch is not dead." A gun was placed against her head and Belinda heard three clicks, but the gun did not fire. She "played dead" until Jackson, Dyer, and Ario left. None of them appeared intoxicated at any time during the evening.

Eventually, Belinda Murray managed to get up, locate a phone, and contact an ambulance and the police. Warren also managed to flag down a police car and was taken to a hospital.

An autopsy of Floyd Murray's body revealed four gunshot wounds to the head and shoulder, at least two of which were caused by .38 caliber bullets. An autopsy of Fluker's body disclosed three gunshot wounds to the head and shoulder blade, at least one of which was from a .45 caliber gun and at least one from a .38 caliber gun.

A.

Dyer's theory of defense was diminished capacity. Dyer did not deny or attempt to justify his actions. Instead, he claimed that his own mental faculties were impaired by his consumption of drugs and alcohol. Dyer testified that he snorted cocaine and drank wine and brandy with Jackson and Ario before they went to Belinda

Murray's apartment. At the house, Ario injected him with a combination of cocaine and heroin.

Dyer testified that when he left Belinda's apartment with Jackson and Ario, they went to the home of Delphine "Dee" Dismuke, where Dyer smoked marijuana, snorted cocaine, and drank gin. According to Dyer, the three men then returned to Belinda's house where Ario injected him again. Dyer testified that he fell asleep, and after he woke up, noticed that everyone had left and that his rings, money, and .38 caliber gun were missing. Dyer said he asked Belinda Murray what happened to his gun and whether his brother had his rings. She told him that she had put his gun in the closet with Ario's and that she did not know whether Jackson had his rings. Dyer asked her who was standing over him when he fell asleep and she told him that it was Warren. After retrieving both guns, Dyer testified that he and Belinda Murray walked through the housing project looking for Warren, and soon returned when their search was fruitless.

Dyer testified that when Warren arrived at the Murray house, Belinda Murray opened the door and let him in. Dyer said that he asked Warren for his rings, they began arguing, and that Dyer began hitting Warren with the guns. Dyer admitted pistol-whipping Warren but testified that he was "confused ... hurt [and] mad" and that he "didn't know ... what was actually going on." Dyer remembered pointing the gun at Jackson and Ario and pushing them away when they walked in.

The next thing that Dyer said he recalled was sitting in Jackson's car with his head down, crying. He said that Jackson put his arms around Dyer and told him that it would "be cool." Dyer remembered the car stopping, exiting the car, and hearing gun shots. He did not remember whether he fired any of the shots, but did not

deny shooting anyone. When asked at trial if he killed anyone, Dyer said, "It's possible. I had a gun. I don't know."

Dyer recalled being at a friend's house the following morning, but could not remember the interim period very well. Dyer testified that he took some more cocaine at his friend's house and then called his mother. She told him that Fluker and Floyd Murray were dead and that the police were looking for him. Over four months after the shootings, Dyer surrendered to the police.

Dyer's primary witness at trial, Kate B. Yago, M.D., was certified as an expert in the area of drugs that adversely affect the brain. She opined that Dyer had been suffering from a drug overload at the time of the killings. Dr. Yago conceded that Dyer should have recalled certain events in light of his recollection of other events. Responding to a hypothetical question, Dr. Yago testified that a person such as Dyer "would have [had] to [have] be[en] clearheaded" to have acted the way he did. She was unable to name any drug- induced conditions that could account for Dyer's selective memory loss, but indicated that the drugs Dyer ingested, in isolation, often cause loss of memory. When asked if she could think of any medical explanation for a hypothetical situation based on Dyer's testimonial account of his mental state on the night of the killings, Dr. Yago testified, "If I am to believe your hypothetical, then I can't."

B.

The State presented no penalty-phase evidence, other than proof of Dyer's prior robbery and burglary convictions. Dyer called co-workers, his mother, and a psychologist, Dr. Thomas Hilliard, to testify at the penalty phase.

Dr. Hilliard interviewed Dyer three times. He found Dyer to be a polite, low- keyed, soft-spoken, and a cooperative man who was not evasive or malingering. Dyer was coherent, alert, and well-oriented, except for his "spotty, incomplete and confused" memory of the night of the shootings. Hilliard testified that he detected signs of "depression, anxiety and tension." Several times during the interviews, Dyer broke down and sobbed for a while before regaining his composure. Dr. Hilliard told the jury about Dyer's personal history, from infancy to the time of the killings.

Two of Dyer's co-workers testified about Dyer's dependable work habits as a bus driver and about his ability to work well with children. Dyer's mother testified about his childhood and character.

We review de novo the denial of Dyer's petition for writ of habeas corpus. *Bonin v. Calderon*, 59 F.3d 815, 823 (9th Cir.) (*Bonin*), *cert. denied*, 516 U.S. 1051, 116 S.Ct. 718, 133 L.Ed.2d 671 (1996). However, findings of fact made by the district court underlying its denial of Dyer's petition are reviewed for clear error. *Id.*

During the pendency of Dyer's appeal, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (Act), 142 Cong.Rec. H3305-01 (1996) (to be codified at 28 U.S.C. § 2261). The Act does not retroactively apply to Dyer's appeal. *Jeffries v. Wood*, 103 F.3d 827 (9th Cir.1996) (en banc).

II

Dyer contends that the presence of Jessica Freeland on the jury deprived him of his constitutional right to an impartial jury. He argues that Freeland was dishonest during voir dire, intentionally failing to disclose certain

relevant information. Alternatively, Dyer argues that even if Freeland's false answers were given in good faith, we should presume Freeland was biased.

A.

Prior to jury selection for Dyer's trial, each prospective juror was given written questions about employment, residence, family, experience with criminal proceedings, prior jury service, and prior contact with law enforcement personnel. When asked orally during voir dire, Freeland answered, "No" to the following questions:

> 13. Have you or any of your relatives or close friends ever been the victim of any type of crime?
>
> * * *
>
> 15. Have you or any of your relatives or close friends ever been accused of any offense other than traffic cases?

After the jury returned its guilt-phase verdict, Dyer learned that Freeland's brother Richard had been killed five to ten years earlier. The trial court called Freeland into chambers with counsel and conducted a hearing in absence of the jury. Freeland admitted that her brother had been shot and killed approximately five years earlier. She said she did not know whether any legal proceedings were instituted against "the man that accidentally shot him." Freeland explained that she answered "no" to Question 13 because she believed her brother's death was an accident and not a crime. She stated that she could be fair in Dyer's case.

The trial court found no lack of candor in Freeland's answers and denied Dyer's motion for a mistrial. In rejecting Dyer's subsequent motion for a new trial, the trial court found that the questions were ambiguous and that Freeland's responses were inadvertent.

On direct appeal, the California Supreme Court agreed that the questions were ambiguous and found no evidence that Freeland was lying when she said that no member of her family had been a crime victim. *People v. Dyer*, 45 Cal.3d 26, 58-59, 246 Cal.Rptr. 209, 753 P.2d 1 (*Dyer*), *cert. denied*, 488 U.S. 934, 109 S.Ct. 330, 102 L.Ed.2d 347 (1988).

The district court conducted an evidentiary hearing on the issue of Freeland's bias, at which Dyer presented the following evidence to support his contention that Freeland's answer to Question 13 was dishonest: (1) Freeland was close to Richard and lived with him and her mother at the time Richard was killed; (2) Richard's death caused the family pain; (3) Freeland's mother testified against Richard's killer in criminal proceedings; and (4) Freeland's family filed a wrongful-death action against Richard's killer and recovered $15,000.

Dyer also presented evidence at the hearing that Freeland's responses during voir dire failed to reveal the following: (1) while lying on a couch, she had been attacked by her young cousin, who had a knife, but she was not hurt; (2) her father had been arrested for kidnapping his children; (3) her brother and her uncle had both been accused of crimes; (4) her family home and her car had been broken into and burglarized on multiple occasions; and (5) her former husband had been arrested for rape.

After reviewing this additional evidence, the district court refused to disrupt the state courts' findings regarding Freeland's honesty and refused to presume that Freeland was biased.

B.

The Sixth Amendment "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). "Even if only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury." *Tinsley v. Borg*, 895 F.2d 520, 523-24 (9th Cir.1990) (*Tinsley*) (internal quotations omitted), *cert. denied*, 498 U.S. 1091, 111 S.Ct. 974, 112 L.Ed.2d 1059 (1991).

The Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982) (*Smith*). Due process only requires that the defendant be tried by "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.*

Dyer is entitled to a new trial if he "first demonstrate[s] that a juror failed to answer honestly a material question on *voir dire*, and then further show[s] that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984) (*McDonough*); *United States v. Edmond*, 43 F.3d 472, 474 & n. 1 (9th Cir.1994) (holding that a showing of juror dishonesty is a necessary predicate

to obtaining a new trial);[1] *Tinsley*, 895 F.2d at 524-25 (applying standard to claim of impartiality on habeas). Thus, we must begin by asking whether Dyer has shown that Freeland lied when she answered "no" to two questions on voir dire.

1.

When reviewing a petition for habeas corpus, we must, absent one of eight statutory exceptions, presume the correctness of state court findings of "basic, primary, or historical facts." *Thompson v. Keohane*, 516 U.S. 99, ----, 116 S.Ct. 457, 464, 133 L.Ed.2d 383 (1995) (*Thompson*), quoting *Townsend v. Sain*, 372 U.S. 293, 309 n. 6, 83 S.Ct. 745, 755 n. 6, 9 L.Ed.2d 770 (1963) *Tinsley*, 895 F.2d at 525; see 28 U.S.C. § 2254(d). Because "resolution depends heavily on the trial court's appraisal of witness credibility and demeanor," *Thompson*, 516 U.S.

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1. Dyer argues that we should follow several of our sister circuits and interpret the concurring opinions in *McDonough* to hold that a juror's dishonesty is not a necessary predicate to obtaining a new trial. *See McDonough*, 464 U.S. at 556-57, 104 S.Ct. at 850-51 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring) ("regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option ... to order a post-trial hearing at which the movant has the opportunity to demonstrate ... bias"); *id.* at 558, 104 S.Ct. at 851 (Brennan, J., joined by Marshall, J., concurring in the judgment) ("Whether the juror answered a particular question on *voir dire* honestly or dishonestly, or whether an inaccurate answer was inadvertent or intentional, are simply factors to be considered in [the] determination of actual bias."); *see also Zerka v. Green*, 49 F.3d 1181, 1186 n. 7 (6th Cir.1995) (counting votes in *McDonough* and concluding that a finding of dishonesty is not a prerequisite to relief); *Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir.) (same), *cert. denied*, 506 U.S. 1000, 113 S.Ct. 602, 121 L.Ed.2d 538 (1992); *Cannon v. Lockhart*, 850 F.2d 437, 440 (8th Cir.1988) (same). We are bound to follow *Edmond* and hold that a showing of juror dishonesty is required.

at ----, 116 S.Ct. at 465, juror impartiality is a factual issue that falls within the statutory presumption of correctness. Id.; *Wainwright v. Witt*, 469 U.S. 412, 429, 105 S.Ct. 844, 854-55, 83 L.Ed.2d 841 (1985) (*Witt*); *see also Miller v. Fenton*, 474 U.S. 104, 114, 106 S.Ct. 445, 452, 88 L.Ed.2d 405 (1985) ("[T]he state trial judge is in a position to assess juror bias that is far superior to that of federal judges reviewing an application for a writ of habeas corpus."); *Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.) (*Knaubert*) ("We can think of no sort of factual finding that is more appropriate for deferential treatment than is a state court's credibility determination."), *cert. denied*, 479 U.S. 867, 107 S.Ct. 228, 93 L.Ed.2d 155 (1986). A trial court decision that a juror is impartial is to be given "presumptive weight," *Thompson*, 516 U.S. at ----, 116 S.Ct. at 465, and "special deference." *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2892, 81 L.Ed.2d 847 (1984) (*Patton*).

The state trial court made findings that Freeland's answers on voir dire were not dishonest or intentionally misleading. At the in camera hearing, the trial court had an adequate opportunity to witness Freeland's demeanor and questioned her about her understanding of the circumstances surrounding her brother's death and whether she believed it would affect her partiality. The trial court refused to "characterize anything [Freeland] did or did not do as demonstrating any lack of candor." Also, the trial court found that Freeland's allegedly false answers to the two voir dire questions at issue were "inadvertent" and were given in "good faith." We will give presumptive weight to these findings of Freeland's impartiality unless a statutory exception exists.

Dyer argues that the statutory presumption should not apply because material facts were not developed adequately at the state court hearings. 28 U.S.C. §

2254(d)(3). Alternatively, he argues that if the presumption applies, he has established by convincing evidence that the state court determinations regarding Freeland's honesty were erroneous. 28 U.S.C. § 2254(d).

a.

Dyer contends that material facts about Richard's death were not developed adequately at the trial court proceeding. However, the trial court found that Freeland honestly believed that her brother's death was an accident, and therefore not a crime. This finding is not inconsistent with Freeland and Richard's closeness. That Richard's death seriously affected Freeland and her family is also not inconsistent with Freeland's then belief that her brother was accidentally killed. Dyer alleges that the state court and state supreme court did not know or did not consider that Freeland's mother testified against Richard's killer in criminal proceedings. Yet Dyer does not show that Freeland knew about this testimony, nor does this fact necessarily establish that she believed Richard's killer had committed a crime. Dyer also alleges that the trial court was unaware that Freeland's family instituted a wrongful death suit against Richard's killer, and that the family received civil restitution from the killer. But the state supreme court was aware of the lawsuit and settlement and upheld the trial court's finding of impartiality. *Dyer*, 45 Cal.3d at 59, 246 Cal.Rptr. 209, 753 P.2d 1. Knowledge of a wrongful death action or restitution would not be inconsistent with Freeland's belief that her brother was accidently killed. We therefore refuse to disrupt the state courts' determination that Freeland answered honestly based on evidence unknown to the state trial judge that is wholly consistent with such a finding.

But Dyer contends that the trial court was unaware that Freeland failed to reveal that she was "attacked" by her cousin, that her father had been arrested for kidnapping Freeland and her siblings, that her uncle had been arrested for murder, that her brother had been arrested on drug charges, that Freeland's cars and homes had been burglarized on numerous occasions, and that her former husband had been arrested for rape. As to each of these additional facts, Freeland has since explained why she originally failed to disclose. Although not present at the district court's evidentiary hearing, she testified at her prehearing deposition that at the time of voir dire, she did not know about her brother's or estranged husband's arrests. She considered her uncle too remote to be family. She regarded her father's arrest for kidnapping and her cousin's assault as remote, apparently inconsequential events. She did not consider that burglaries of her homes and cars rendered her a "victim of a crime." She stated that, "I was not attempting to be deceptive. I'm just saying it was not on my mind, 'Yeah, burglary, I'm the victim of a crime.' [ ] I read ... 'victim of a crime,' ... like victim of some violent attack or something like that. Burglaries [are] not a big issue with people in Oakland." The district court explicitly credited Freeland's testimony and found that the new evidence did not detract from the state courts' findings about Freeland's credibility. This finding is not clearly erroneous.

The dissent would not defer to the state trial court's and district court's findings of fact because "the [state] court did not adequately develop the material facts." Dissent at 10099; *see also id.* at 10100 ("[n]or did the court develop the evidence of the sexual assault and multiple burglaries committed against Freeland, or the serious crimes charged against her several immediate relatives"). Of course, we do not place the onus on the trial court to unearth every bit of evidence that might indicate that a

particular juror is biased. Rather, "it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." *Witt*, 469 U.S. at 423, 105 S.Ct. at 852; *see also Smith*, 455 U.S. at 215, 102 S.Ct. 940, 944-45, 71 L.Ed.2d 78 (Supreme "Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias"). In fact, added facts were placed before the state trial judge when Dyer moved for a new trial and his counsel filed a declaration, asserting that the killer of Freeland's brother was convicted of voluntary manslaughter. The motion argued, as the dissent does now, that Freeland's "reasoning is simply incredible."

In any event, we are faced with not only state court findings of impartiality, but with district court findings that are based on the additional facts that Dyer has since proffered and on which the dissent focuses its attention. As the district court found, none of these additional facts provides any reason to disturb the state courts' finding that Freeland was honest in her responses. *See Nix v. Williams*, 467 U.S. 431, 449-50, 104 S.Ct. 2501, 2511-12, 81 L.Ed.2d 377 (1984) (newly discovered evidence failed to demonstrate that facts were not adequately developed in state court). Dyer complains that the district court relied only on Freeland's deposition testimony and that no court has confronted her with all of her omissions and determined that she was dishonest. However, none of the district court's findings as to Freeland's credibility is clearly erroneous. Therefore, these additional facts should not destroy the presumption that the state courts' findings of fact are correct. *See Bonin*, 59 F.3d at 823.

b.

If the statutory presumption in favor of crediting the trial court's factual findings applies, Dyer argues alternatively that he has presented convincing evidence to rebut the state courts' findings of Freeland's honesty. Although the number of crimes committed by members of her family seems high, and the number of incidents in which she or members of her family were victims of crimes also seems high, these facts above do not establish that Freeland was dishonest. Freeland is apparently from a crime-ridden community--a fact which plausibly both affects her understanding of what qualifies as a crime and influenced her answers to Questions 13 and 15. Both the trial court and state supreme court found that the voir dire questions were ambiguous and that Freeland's responses at the in camera hearing and at her deposition were honest. *See United States v. Nickell*, 883 F.2d 824, 827 (9th Cir.1989) (where juror's answer is consistent with one interpretation of ambiguous question, there is no basis for finding dishonesty). The record as a whole, including Freeland's deposition testimony and her responses at the in camera hearing, is adequate to support the findings that she was not being dishonest during voir dire. *See McDonough*, 464 U.S. at 556, 104 S.Ct. at 849 ("The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.").

The dissent rejects the state court's factual findings as to Freeland's honesty and would instead find that Freeland's responses were "patently implausible." Dissent at 10093. The dissent's keystone is that "Freeland lied," and that her "blatant lies demonstrate her actual bias." *Id.* at 10090-91. But did she lie? Our time-tested judicial system relies heavily on the trial judge to make this determination. Of course, one may assume a fact from the cold, sterile reporter's transcript, but experience has demonstrated that the trial judge, using all the senses

(including even voice inflections), is in the best position to determine credibility. All trial judges have had that experience--and appellate judges properly defer to the factual finding of credibility. Indeed, on issues of credibility, we give special deference. *Knaubert*, 791 F.2d at 727.

We, therefore, are unwilling to second-guess the state judge, who had ample opportunity to view Freeland's demeanor and assess her responses. The record certainly supports the trial court's assessment of Freeland's honesty on the subject of her brother's death. The very first question posed to Freeland at the hearing was whether "at any time in the last five or ten years ha[s] any member of [her] family or former member of [her] family, or anyone who was ever related to [her] [been] the victim of a homicide." When asked this different, direct, pointed question, Freeland answered, "Yes, my brother." When asked why this event did not stop her from answering "no" to Question 13, Freeland's answer was plausible. The dissent would refind the facts and hold that her answer "defie[d] common sense." Dissent at 10094. We, on the other hand, can imagine a number of sensible reasons to explain Freeland's belief. For example, her father may have withheld the truth to protect Freeland, or despite persuasive evidence to the contrary, Freeland may have been willfully blind. But we need not delve into Freeland's psyche. Rather, the trial court saw Freeland testify and simply did not believe that she lied. *See Dennis v. United States*, 339 U.S. 162, 171, 70 S.Ct. 519, 523, 94 L.Ed. 734 (1950) ("One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter."). Simply put, while there are substantial questions raised as to her credibility, the findings by the state trial court, added to by

the findings of the district judge, have not been demonstrated by Dyer to be clearly erroneous--given the special credibility deference we are required to apply: she believed what she said was true at that time.

2.

We add, without extensive elaboration, that there is a second burden placed on Dyer to receive habeas corpus relief on this issue. Dyer must show that a "correct" response would have provided a valid basis for a challenge for cause. *McDonough*, 464 U.S. at 556, 104 S.Ct. at 850. To have the trial court excuse Freeland for cause, Dyer must demonstrate to the trial judge that Freeland could not be a fair juror. That is, regardless of past experience, could she be a fair juror and decide the case on the facts found to be true and the law provided by the court? *See Patton*, 467 U.S. at 1035, 104 S.Ct. at 2890-91 ("The relevant question is ... whether the juror[ ] ... had such fixed opinions that [she] could not judge impartially the guilt of the defendant."); *United States v. Quintero-Barraza*, 78 F.3d 1344, 1349-50 (9th Cir.) (quoting *Patton*), *cert. denied*, --- U.S. ----, 117 S.Ct. 135, 136 L.Ed.2d 83 (1996).

The state trial judge found she could. The district court's findings uphold the state court's finding that Freeland could be fair. In effect, these courts found Freeland was "capable and willing to decide the case solely on the evidence" presented. *Smith*, 455 U.S. at 217, 102 S.Ct. at 946. However, this issue was not argued before us, and we take no position on it. Because of our holding in part II.B.1., it is unnecessary for us to consider it.

C.

Dyer also argues that even if Freeland did not withhold information intentionally, we should presume or imply bias based on the circumstances. The Supreme Court has never explicitly held that we may infer or presume bias based on the totality of the circumstances. We are extremely reluctant to do so, and we will presume bias only in the rarest and most extraordinary circumstances. *Tinsley*, 895 F.2d at 527; *see also McDonough*, 464 U.S. at 556-57, 104 S.Ct. at 850-51 (Blackmun, J., concurring); id. at 558, 104 S.Ct. at 851 (Brennan, J., concurring).

In only two cases have we held that "bias could be implied or presumed from the 'potential for substantial emotional involvement, adversely affecting impartiality,' inherent in certain relationships." *Tinsley*, 895 F.2d at 527, quoting *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977). In *Allsup*, we held that two jurors in a bank robbery trial were partial despite their protestations of impartiality and the district court's finding of impartiality. *Allsup* presumed bias because the jurors were employees of a different branch of a bank that was robbed. 566 F.2d at 71. In addition, the jurors' employment relationship with the bank and their "reasonable apprehension of violence" due to the risk of violence from bank robbers created a "substantial probability" that the jurors could not be impartial. *Id.* at 71-72. Similarly, in *United States v. Eubanks*, 591 F.2d 513 (9th Cir.1979), a heroin conspiracy trial, a juror did not disclose on voir dire that two of his children were in prison for heroin-related crimes. *Id.* at 516. We presumed that the juror was biased because of his children's involvement with heroin. *Id.* at 517.

Dyer insists that his is an extreme and extraordinary case that requires us to presume bias. He urges us to presume that Freeland was partial because she and so many of her relatives have either been convicted of crimes

or been victims. Dyer especially urges a finding of bias because Freeland's brother was shot several times in the head, just as the victims in this case were. We recognize that on rare occasions, "[c]ourts have been willing to presume bias where a juror or his close relatives have been personally involved in a situation involving a similar fact pattern." *Tinsley*, 895 F.2d at 528 (citing cases). However, here we accept the trial court finding that Freeland honestly believed that her brother had been killed accidentally. In addition, we do not believe that one characteristic of the two events--the similar manner of death--renders the case extraordinary or extreme.

We also recognize that, at first glance, it seems extraordinary that Freeland has experienced such tragedies. However, considering the alleged rate of crime in Freeland's neighborhood, her situation as to much of this background is not so surprising or extraordinary. Indeed, Freeland has experienced crime from both sides--as a victim and as the family member of criminals. We cannot say that there was an inherent "potential for substantial emotional involvement, adversely affecting impartiality." *Id.* at 527 (internal quotation omitted). Freeland herself testified that she had forgotten about most of the crimes in her past and that she had "a ton of relatives" who "have done things." Although her brother was killed by a gunshot wound to the head, which she believed was accidental, she also has relatives who have been convicted of crimes. Thus, Dyer has not shown that she would have been biased for or against him. *See Romano v. Oklahoma*, 512 U.S. 1, 11-13, 114 S.Ct. 2004, 2012-13, 129 L.Ed.2d 1 (1994) (*Romano*) (because erroneously admitted evidence could have made jurors more inclined to impose death, or less inclined to impose death, court would not find prejudice based on mere speculation). We therefore will not presume that because Freeland may have associated or lived with people who

have committed crimes, or that because she has been a victim of crimes, she was presumably biased against Dyer.

The dissent would imply bias based on the similarities between Freeland's brother's death and the facts surrounding Dyer's crimes. However, as we explained earlier, we presume that the state court's findings are correct that Freeland did not understand or know the facts surrounding her brother's death when she served as a juror. Thus, even if these circumstances were sufficiently extraordinary to indicate that Freeland might be biased, we would not imply bias where we have already upheld state court findings that show that Freeland was not aware of the similarities.

III

Dyer next contends that his trial attorney, John Burris, provided ineffective assistance for failing to investigate, obtain, and present evidence of Dyer's use of phencyclidine (PCP) before the murders, Dyer's psychological and social history, and Dyer's organic brain damage. Dyer also argues that Burris failed to investigate the circumstances of his prior robbery conviction and was ineffective at the penalty phase for failing to contest the facts underlying the robbery conviction. Dyer's claims of ineffective assistance of counsel present mixed questions of law and fact that we review de novo. *McKenna v. McDaniel*, 65 F.3d 1483, 1490 (9th Cir.1995), *cert. denied*, 517 U.S. 1150, 116 S.Ct. 1451, 134 L.Ed.2d 570 (1996).

To establish that his trial counsel was constitutionally defective, Dyer must demonstrate "(1) that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense." *Bonin*, 59 F.3d at 833 (internal

quotations and citations omitted). The ultimate question is whether Burris's "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (*Strickland*). We must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. at 2065. Our review of counsel's performance under *Strickland* is extremely limited:

> The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.

White v. Singletary, 972 F.2d 1218, 1220 (11th Cir.1992), *cert. denied*, 514 U.S. 1131, 115 S.Ct. 2008, 131 L.Ed.2d 1008 (1995). Thus, "[w]e will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir.) (en banc), *cert. denied*, 511 U.S. 1119, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994).

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2066. A "particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691, 104 S.Ct. at 2066.

To make out a claim, Dyer must establish prejudice, demonstrating that there is a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Bonin*, 59 F.3d at 833 (citations omitted).

A.

Dyer contends that all of his actions on the night of the murders could have been explained with testimony that Dyer had ingested PCP and that he was prejudiced because Burris failed to investigate and present evidence to this effect. Such evidence, Dyer asserts, would have bolstered his diminished capacity defense and would have amounted to mitigating evidence at the penalty phase that reasonably would have led to a life sentence.

1.

Dyer argues that Burris's investigation into Dyer's possible ingestion of PCP was inadequate. Dyer has now come forward with depositions from three witnesses--Sandra Collins, Roger Dismuke, and Charles Howard--who say they saw Dyer smoke "sherm" (a street name for cigarettes laced with PCP) at Dismuke's party on the night of the murders. In addition, Dr. Yago, the defense expert at Dyer's trial who discussed the general effects of cocaine, heroin, amphetamines, methamphetamines, and combinations of these drugs, such as speedballs, now asserts that had she known that Dyer may have ingested PCP, she would have testified differently. Dr. Yago now contends that Dyer's ingestion of PCP on the night of the murders "could explain" his alleged cognitive impairments and memory lapses.

Despite the medical evidence that Dyer now proffers, and despite the depositions of witnesses who now testify

that he smoked "sherm," we cannot say that Burris's investigation was constitutionally ineffective. Burris stated that he knew that some of those attending Dismuke's party had smoked sherm because Dyer knew and told him that PCP was being used at the party. However, Dyer never told Burris that he had smoked sherm. None of the doctors who interviewed or examined Dyer before trial indicated that Dyer had admitted smoking sherm. In fact, no one with whom Burris or his assistants spoke stated that Dyer had mentioned smoking PCP-laced cigarettes.

Despite the lack of credible or corroborating evidence that Dyer himself ingested PCP, Burris stated that he explored the possibility that Dyer had consumed that drug in addition to the others. Burris sent an investigator to interview Dismuke. He informed the investigator that Dyer "consumed alcohol and smoked marijuana or dope at [Dismuke's] home." Burris testified that he "would consider smoking a sherm as dope." Although the investigator failed to locate Dismuke, Burris's law clerk eventually found her. Based on the clerk's interview, which may or may not have included a discussion of PCP, Burris decided not to interview Dismuke further and decided not to call her to testify.

Based on the evidence before us, we cannot say that Burris's investigation was inadequate. Although he knew that PCP was consumed at Dismuke's party, Burris had no credible evidence from Dyer or anyone else that Dyer himself had ingested PCP. No expert at the time of trial associated Dyer's behavior with possible ingestion of PCP. Thus, simply because Burris was aware of possible PCP use but did not attempt to have witnesses interviewed or locate additional evidence that would corroborate his suspicions, his investigation was not deficient. Even if Burris was not fully educated as to the subtle differences between the effects of PCP and the effects of other drugs,

this lack of knowledge is irrelevant. It was the lack of credible evidence that led Burris to the decision not to pursue Dyer's possible PCP use. *See Wade v. Calderon*, 29 F.3d 1312, 1318-19 (9th Cir.1994) (*Wade*) (not ineffective assistance where counsel decided not to present evidence of petitioner's possible PCP use because of lack of evidence and because of his belief that jury would use such evidence only in aggravation), *cert. denied*, 513 U.S. 1120, 115 S.Ct. 923, 130 L.Ed.2d 802 (1995).

Because Burris, after a reasonable initial investigation, was unable to locate credible evidence that would have supported a PCP theory, his tactical decision not to investigate further was also reasonable. *See Hensley v. Crist*, 67 F.3d 181, 185 (9th Cir.1995) (*Hensley*) ("Tactical decisions that are not objectively unreasonable do not constitute ineffective assistance of counsel."); Wade, 29 F.3d at 1319. Rather, "the wholly unremarkable fact [is] that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir.) (en banc) (*Waters*), *cert. denied*, 516 U.S. 856, 116 S.Ct. 160, 133 L.Ed.2d 103 (1995). The fact that Dyer can now proffer evidence that he ingested PCP does not change the tactical nature of Burris's reasonable decision to utilize his limited resources elsewhere.

For the same reasons, Burris's failure to present evidence of PCP use at the penalty stage was also reasonable. Because the jury rejected his diminished-capacity defense at trial, Burris reasonably decided to present a positive portrait of Dyer at the penalty phase. Burris wanted to downplay the influence of drugs in order to avoid suggesting that Dyer acted

totally irresponsibly. This decision was tactical and reasonable.

2.

Even assuming that Burris's initial investigation into Dyer's ingestion of PCP was inadequate, Dyer has not proved that he was prejudiced by such an error. It is not reasonably probable that the outcome of Dyer's trial would have been different had Burris investigated further.

First, Dyer has failed to show that had Burris investigated, he would have uncovered credible evidence that would have strengthened Dyer's case. The present cooperation of Roger Dismuke and Howard is in bold contrast with their response at trial. Roger Dismuke indicated at the time of trial that he would not testify on Dyer's behalf. Burris's law clerk did contact Howard, who at the time agreed to keep Burris informed of any helpful information. Dyer has not shown that had Burris investigated Howard further, Howard would have revealed anything that might have helped Dyer at trial. In addition, at the time of the offense, Collins was fifteen, and it has not been demonstrated that Dyer's case would have been strengthened had a fifteen-year-old testified that Dyer shared PCP-laced cigarettes with her. Furthermore, testimony from the witnesses would have revealed additional inconsistencies. Collins, Howard, and Roger Dismuke disagree as to whether Dyer knew he was smoking PCP. They also disagree as to whether sherm has a distinctive smell that would alert a smoker as to what he was smoking.

The dissent points to a list of additional witnesses, including Dyer himself who, if investigated and called to testify, together would have established that Dyer used PCP. Dissent at 750-52. However, there is no indication

that Dyer remembered taking PCP; thus, he could not and did not testify to having done so. Dr. David Smith's testimony at the district court's evidentiary hearing does not reliably indicate that Dyer ingested PCP. *Compare id.* Rather, Dr. Smith ambiguously testified that Dyer may have told him that "he thought he had taken--gotten PCP some way or another." In fact, Burris testified at the district court's evidentiary hearing that "[t]he reason why I didn't follow up with [Dr. Smith] is because he told me that he did not think that I had a very good case in order to build a diminished capacity defense around the drugs that [ ] Mr. Dyer had taken." Thus, even if Dr. Smith were aware that Dyer may have ingested PCP, he did not believe that it was strategically wise to rely on a diminished capacity defense. Burris disagreed and sought another opinion. Dyer has not shown that had Burris pushed Dr. Smith, Smith would have changed his opinion as to proper trial strategy and would have emphasized that Dyer may have ingested PCP. Furthermore, like Roger Dismuke and Howard, Delphine Dismuke was less than cooperative when Burris's law clerk interviewed her. Even presuming that she would have cooperated had Burris investigated further, her testimony would have contradicted the testimony from Howard and Collins. Delphine Dismuke testified at the evidentiary hearing that Dyer was uncharacteristically aggressive, while Howard and Collins noticed nothing unusual.

Second, not only would further investigation have proved futile, but the evidence Dyer now proffers regarding the effects of PCP are mostly cumulative of the effects of the other drugs that he did admit to consuming. *See United States v. Schaflander*, 743 F.2d 714, 718-19 (9th Cir.1984) (*Schaflander*) (failure to present cumulative testimony does not show prejudicial ineffective assistance), *cert. denied*, 470 U.S. 1058, 105 S.Ct. 1772, 84 L.Ed.2d 832

(1985). Dr. Yago's declaration catalogs the range of physical and psychological effects of PCP:

> Physical effects can include pupillary constriction, blurred vision, increased blood pressure and heart rate, sweating, nausea, and vomiting. PCP can cause depersonalization (feeling as if watching oneself from outside), agitation, disorganization of thought processes, visual and auditory distortions, intense feelings of alienation and paranoia, catatonic rigidity, mutism, and acute psychosis.

In addition, Dr. Yago now explains that a person intoxicated with PCP may engage in a series of acts without judgment or reasoning, may engage in psychotic behavior, and may engage in random, detached, inappropriate violent acts. She states that PCP "could explain" Dyer's ability to sleep for a short period despite ingesting numerous stimulants and that it "could explain" his partial amnesia and goal-oriented behavior.

At trial, Dr. Yago testified that many of these same effects could have been caused by cocaine, heroin, amphetamines, methamphetamines, or a combination of these substances. Cocaine, she testified, can cause increased blood pressure, an increased heart rate, a sense of being hot, "a feeling as if one wants to move around, being more active, pacing back and forth, anxious," flu-like symptoms, confusion, irrational paranoia, and extreme violence. She testified that heroin is a sedative that can cause a person to "nod off." Amphetamines, she testified, can cause paranoia, confusion, disorientation, impaired perception, delirium, and memory loss. She testified that combining drugs can cause auditory and visual distortions, spontaneous aggression, and temporary periods of deep sleep. Dr. Yago also testified that what could appear as

goal- oriented behavior could actually be based on psychotic thought processes.

At most, then, had Dr. Yago known that Dyer may have ingested PCP, and had Burris been able to produce credible evidence that Dyer had ingested PCP, Dr. Yago might have been better able to account for Dyer's goal-oriented behavior and selective memory loss. Not only has Dyer failed to show that evidence of his alleged PCP use should have been uncovered, but he has failed to demonstrate that a fuller account of his alleged behavior would have led to a different result. Thus, Burris's failure to investigate and discover evidence that Dyer used PCP, and his failure to present such evidence to Dr. Yago for her analysis, did not prejudice Dyer.

B.

Next, Dyer alleges that Burris was ineffective for failing to investigate, obtain, and present additional evidence of Dyer's psychological and social history. Dyer catalogs a number of facts about his past that Burris failed to discover and argues that Burris's mitigation case was therefore unconstitutionally inadequate.

We have held defense counsel's performance ineffective where counsel presents absolutely no mitigating evidence in a case where substantial evidence was available. *Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir.1992), *cert. denied*, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993). However, counsel's decision not to conduct a particular investigation does not render performance defective where the decision is reasonably justifiable. *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066-67. We have never held that counsel has a duty to uncover every aspect of a defendant's past and to present all evidence that might bolster a defendant's mitigation

case. Rather, trial counsel's resources are limited and the strategic decision to emphasize certain aspects of a defendant's background at the expense of investigating others is both reasonable and wholly acceptable. *See Waters*, 46 F.3d at 1514.

Here, Burris did present substantial evidence of Dyer's psychological and social history. Dr. Hilliard conducted psychological tests, interviewed Dyer three times, and interviewed Dyer's mother and co-workers. Dr. Hilliard, Dyer's mother, and two co-workers all testified during the penalty phase. Dr. Hilliard obtained a complete history in which he traced Dyer's development from birth until the time of the murders. As the district court recognized, the jury heard, among other things, that Dyer was well-behaved, nonviolent, and a peacemaker; that he helped his mother around the house from a very young age and enjoyed skating and boxing; that he stammered, had academic difficulties, and was teased as a child; that his mother was only fifteen when he was born and that she relocated without him on two occasions; that he grew up in overcrowded housing projects with his grandmother and had no father figure; and that he felt remorse about the offense.

Dyer's newly proffered evidence, largely cumulative of the information that was actually presented to the jury, does not establish Burris's ineffectiveness. *Schaflander*, 743 F.2d at 718. The prosecution did not challenge any of the background information Burris presented, and Burris did not believe that it was necessary to present additional evidence. This was a reasonable tactical decision. *See Hensley*, 67 F.3d at 185; *Mills v. Singletary*, 63 F.3d 999, 1024 (11th Cir.1995) ("counsel is not required indiscriminately to present evidence"), *cert. denied*, 517 U.S. 1214, 116 S.Ct. 1837, 134 L.Ed.2d 940 (1996).

C.

Dyer also contends that Burris was ineffective for failing to investigate and present evidence that Dyer suffers from organic brain damage. The record indicates that Dyer told Burris that he had been in a car accident six to eight weeks before the offense. Burris also knew that Dyer had hit his head in this accident and had been hospitalized. Burris reviewed Dyer's hospital records and had his hospital x-rays reviewed by Dr. Ramona Toscoe, who indicated that there was no apparent structural damage.

The record also indicates that Burris knew that Dyer had been hit on the head with a bottle as a small boy and that Dyer had boxed for a number of years. Burris had Drs. Yago, Hilliard, and Smith examine Dyer. Dr. Yago conducted a psychiatric evaluation and Dr. Hilliard performed psychological tests. None of their reports indicated that Dyer suffered from brain damage.

Dyer essentially argues Burris was ineffective for failing to hire a neurologist or neuropsychologist to conduct further examinations and tests. But Burris conducted no further investigation into possible brain damage because, after examining hospital records and x-rays, Dr. Toscoe discovered no structural abnormality. Burris was entitled to rely on the assessments of Drs. Toscoe, Hilliard, Yago, and Smith, *see Hendricks v. Calderon*, 70 F.3d 1032, 1039 (9th Cir.1995), *cert. denied*, 517 U.S. 1111, 116 S.Ct. 1335, 134 L.Ed.2d 485 (1996), and his decision to focus his efforts elsewhere was also reasonable.

D.

Dyer contends that Burris was ineffective for failing to consider the possibility that a penalty-phase stipulation to a firearm enhancement could be used as evidence in aggravation.

Before trial, Dyer admitted that he had been convicted in 1972 and 1973 for burglary and in 1975 for first degree robbery. The prosecutor later agreed that he would not use these prior convictions during the guilt phase to impeach Dyer or any character witnesses.

At the penalty phase, Burris stipulated to these prior convictions. Based on this stipulation, and over Burris's objection, the jury was instructed that Dyer had been convicted of two other prior convictions and of armed robbery with the use of a firearm. Burris argued that the stipulation, as far as he was concerned, was not meant to allow the prosecution a basis to argue that Dyer's use of a firearm is evidence of violence. However, the prosecution referred to the armed robbery conviction to illustrate Dyer's pattern of increasing violence. Dyer has now proffered evidence that indicates that he did not use a gun in the robbery and argues that Burris's stipulation rendered his assistance constitutionally defective.

Initially, Burris believed that Dyer's diminished capacity defense would be successful and thought that there was a good chance that Dyer would be convicted of less than first-degree murder. His focus was on keeping the convictions out the guilt phase of the trial. When he entered the stipulation, Burris did not consider the ramifications of the pretrial stipulation for the penalty phase. Burris's initial focus on the guilt phase did not render his performance ineffective. Rather, "[t]he choice to pursue a particular strategy in one phase at the cost of lowering the likelihood of success in the other phase is a

tactical decision for which there is no correct answer, but only second guesses." *Id.* at 1041.

At the penalty phase, Burris's tactic was to present Dyer as a decent person. Burris testified that he could have called the victim of the armed robbery to testify, but that doing so would have undercut his strategy. Indeed, had Burris not stipulated to the use of the firearm, the prosecution also could have called the victim of the robbery to the stand to testify. Wanting to avoid this potentially damaging testimony, Burris's stipulation was reasonable.

IV

[14] Dyer also contends that the jury was improperly instructed on the elements of aiding and abetting and that the erroneous instruction amounted to constitutional error. The jury was instructed that Dyer could be convicted of murder if he intentionally aided or abetted its commission or intentionally advised and encouraged its commission "with knowledge of the unlawful purpose of the person who directly and actively commit[ted] ... the crime." This jury instruction has been held to be constitutionally deficient in *People v. Beeman*, 35 Cal.3d 547, 550-51, 199 Cal.Rptr. 60, 674 P.2d 1318 (1984), because the instruction did not require that Dyer act with the specific intent of aiding the principal's crime. *See California v. Roy*, 519 U.S. 2, ----, 117 S.Ct. 337, 338, 136 L.Ed.2d 266 (1996) (*Roy*); *Martinez v. Borg*, 937 F.2d 422, 423 (9th Cir.1991).

In Roy, the Supreme Court held that the harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (*Brecht*), applies to collateral review of Beeman error. *Roy*, 519 U.S. at ---- - ----, 117 S.Ct. at 338-39. Under this standard, we must ask "whether the error 'had substantial and injurious effect or

influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 637, 113 S.Ct. at 1722, quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946).

The jury convicted Dyer of four counts of kidnapping, two counts of attempted murder (Bennie Warren and Belinda Murray), and two counts of first degree murder (Nora Fluker and Floyd Murray). The jury also found that Dyer personally and intentionally inflicted great bodily injury on Fluker and Warren, but that he did not personally inflict great bodily injury on Floyd or Belinda Murray. To convict Dyer of attempted first degree murder of Belinda Murray and Warren, the jury must have found a specific intent to kill. Thus, the Beeman error did not affect these convictions.

As to Fluker, the jury found that Dyer, armed with a .45 caliber semiautomatic pistol, specifically intended to inflict great bodily injury on her and did, in fact, do so. Dyer argues that these findings do not necessarily indicate that he acted with the specific intent to kill Fluker, so that the jury may have rested its conviction on the infirm aiding and abetting instruction. Both the district court and California Supreme Court held that the jury necessarily found that Dyer "personally murdered" Fluker, so that the erroneous instruction played no role in the jury's findings.

Although it is theoretically possible for a jury to return a special verdict of specific intent to do great bodily injury without finding a specific intent to kill, *see People v. Ratliff*, 41 Cal.3d 675, 695, 224 Cal.Rptr. 705, 715 P.2d 665 (1986) (fact that defendant shot victims at close range may have demonstrated intent to disable but, without more, did not establish intent to kill), absolutely no evidence in the record supports this possibility. While Fluker's autopsy revealed that at least one of the bullets found in her body

was from a .38 caliber revolver, Dyer stood over Fluker's body with a .45 and shot her at least once. The jury specifically found that Dyer intended to kill Warren and Belinda Murray, who were lying next to Fluker. No evidence in the record could support a finding that Dyer intended to kill Warren and Belinda, but intended only to injure Fluker.

Because the jury found Dyer not guilty of inflicting great bodily harm on Floyd Murray, the jury implicitly found Dyer guilty of murdering him under the infirm aiding and abetting instruction. The prosecutor specifically asked the jury to convict Dyer of murdering Floyd Murray based on an aiding and abetting theory because the bullets removed from Floyd Murray came from a .38 caliber weapon, and there was no evidence that Dyer himself fired that gun. However, no evidence supports a finding that Dyer lacked the specific criminal intent to assist in Floyd's murder. The California Supreme Court's explanation of what a rational jury must have found is relevant to our inquiry:

> The evidence, coupled with the jury's findings, showed that [Dyer] (1) intentionally assisted in kidnapping Belinda, Bennie, Nora and Floyd; (2) joined in ordering the four victims into and out of the car and onto the ground; (3) personally and intentionally inflicted great bodily injury upon Bennie and Nora; (4) attempted to murder Bennie by shooting him in the head; and (5) murdered Nora by firing [at least one] shot from a .45 caliber revolver into her body at close range. In addition, Ario had told [Dyer] at the apartment that, "if you kill one, you have to kill them all" and [Dyer] replied he would not kill the babies. We must reject [Dyer's] theory that, under the facts of this case, a properly instructed

jury could have found he intended *to kill* Bennie, Belinda, and Nora but not Floyd.

Dyer, 45 Cal.3d at 65, 246 Cal.Rptr. 209, 753 P.2d 1. The evidence cannot support a finding that Dyer lacked the specific intent to assist Jackson in killing Floyd Murray; thus, we hold the error harmless under *Brecht*.

V

Dyer next contends that he suffered prejudice from two ex parte contacts--one among certain jurors and a prosecution witness and one among certain jurors and the trial judge.

First, Dyer complains of contact among a prosecution witness and three jurors. Dyer has presented the testimony of Rick Bartholomew, foreperson of the jury in Dyer's trial, who says that he and two unidentified female jurors walked by Warren as they were leaving the courthouse one day during Dyer's trial. Bartholomew testified that Warren "said something to the effect of 'Hang him,'" and that the jurors may have responded, "Don't talk to us." None of the jurors who encountered Warren discussed the encounter with anyone else.

We assume without deciding that this brief, unreported exchange amounted to jury misconduct. The presumed error is trial error, *Thompson v. Borg*, 74 F.3d 1571, 1574 (9th Cir.) (*Borg*), *cert. denied*, --- U.S. ----, 117 S.Ct. 227, 136 L.Ed.2d 159 (1996), and is subject to harmless-error review. *Brecht*, 507 U.S. at 638, 113 S.Ct. at 1722. We ask whether Warren's statement had a substantial and injurious effect on the outcome. *Borg*, 74 F.3d at 1574; *see also Lee v. Marshall*, 42 F.3d 1296, 1298 (9th Cir.1994) (ruling that contact between jurors and

police officers, where nothing substantive is said, is analyzed under Brecht for harmlessness).

Applying Brecht, it is clear that the type of error that occurred did not have a substantial and injurious effect on Dyer's trial or sentence. One of Dyer's victims, a key prosecution witness, told three jurors to hang Dyer. At the time of the encounter, the jurors had already heard Warren's testimony, and it is safe to say that they were not surprised to hear that Warren, having been shot in the head by Dyer at point-blank range, would not have been too sympathetic to Dyer's plight.

Contrary to the arguments of both Dyer and the dissent, the cases that they cite involve communications that were far more damaging and of a different nature than the one here. In *Stockton v. Commonwealth of Virginia*, 852 F.2d 740 (4th Cir.1988) (*Stockton*), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989), Puckett, the owner of a diner, conversed with jurors who were eating lunch at his restaurant. In the course of the conversation, he told several jurors that "they ought to fry the son of a bitch." *Id.* at 742. Puckett, unlike Warren, was neither a victim nor a witness. Puckett's encounter with the jurors was far longer than the few words exchanged among Warren and the jurors. Puckett "inquired whether they had reached a decision," id., and one juror even responded to him "that they had all decided except for 'one damned woman.'" *Id.* In addition, *Stockton* was a habeas corpus case decided before *Brecht*. The court, applying a rule that is not the law of our circuit, see *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir.1995), presumed prejudice from the encounter.

Lawson involved one juror obtaining and conveying to other jurors information about the defendant's violent reputation. In Lawson, the juror obtained "extrinsic

information directly relat[ing] to a material issue in the case." *Id.* We held that the receipt of this information had a substantial and injurious effect on the outcome. In contrast, Warren provided the jurors with his own opinion, which bore no factual relevance to the outcome. *See United States v. Endicott*, 869 F.2d 452, 457 (9th Cir.1989) (juror approaches main prosecution witness and says that he knows defendant is guilty; ex parte contact held not prejudicial). Likewise, *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir.1988), decided before Brecht, involved a highly prejudicial statement bearing on the petitioner's recidivism. A deputy told the jury "that Dickson had done 'something like this before.' " *Id.* at 408. Dickson followed a line of cases in which we have held that extrinsic evidence of prior criminal acts is highly prejudicial. *Id.* Warren's emotional outburst can hardly be called "extrinsic evidence" of prior criminal acts.

United States v. Maree, 934 F.2d 196 (9th Cir.1991), also decided before *Brecht*, does not alter the outcome of this case. Maree, a direct appeal, applied a stricter standard of review. *Id.* at 201 ("defendant will receive a new trial only if the court finds 'actual prejudice' to the defendant"). Also in Maree, the juror testified that she changed her vote to guilty because two of her friends (not on the jury) told her to do so. *Id.* at 198- 99 n. 2. Nothing in the record suggests that Warren's statement rose to this level of prejudice.

Dyer also contends that he suffered prejudice from a contact among at least two jurors and the trial judge. These two jurors indicated that at some point, the judge saw them in a restaurant and said something to them. Both the nature of the comment and the date of the encounter are unclear.

Bartholomew testified that the judge "commended us for work well done, and he brought a fellow with us to explain that he can't speak to us singularly or alone and that he was the 13th juror, in essence, and he had to go and review and that's why he couldn't really socialize." Bartholomew also testified, "I think he made reference to he could change [the verdict] if he thought we were in error." Another juror, Alfonsa Carney, testified that "all I recall [the trial judge] saying is that ... we were good jurors, that we listened to the evidence and that kind of thing. He said we were good jurors, we listened intensively. He said in his opinion we listened real good to the evidence. He just had a brief conversation."

Bartholomew testified that he was "not real sure" when it took place. He testified that it may have occurred between the guilt and penalty phases, but that it also may have been "at the end of the trial." Carney testified that "we had no contact with him when we sat as jurors," but also that the contact may have been between the guilt and penalty phases.

Dyer argues that the trial judge's statements diminished the jury's sentencing responsibility and amounted to error under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). In *Caldwell*, the prosecutor urged the jury not to view itself as finally determining whether the defendant would die, because a death sentence would be reviewed for correctness by the state supreme court. *Caldwell* held, on direct appeal, that the prosecutor's statement amounted to reversible error because "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29, 105 S.Ct. at 2639.

Neither Bartholomew's nor Carney's testimony indicates exactly when the conversation took place. The judge's statements that they were "good jurors" and his commendation for "work well done" suggests that the contacts occurred after the trial. Furthermore, after reading the testimony of both Bartholomew and Carney, we conclude that the trial judge did not say anything that could have prejudiced Dyer. Taking both jurors' memories of the events together, and assuming that the contact occurred during the guilt or during the sentencing phase, it appears that the judge was simply attempting to avoid any prolonged contact without appearing rude. As the district court quoted from one of our cases, we will "not presume prejudice where a court or its staff show[s] courtesy to citizens serving as jurors." *United States v. Velasquez-Carbona*, 991 F.2d 574, 576 (9th Cir.), *cert. denied*, 508 U.S. 979, 113 S.Ct. 2982, 125 L.Ed.2d 678 (1993); *see also Rushen v. Spain*, 464 U.S. 114, 118, 104 S.Ct. 453, 455-56, 78 L.Ed.2d 267 (1983) ("There is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial."). The nature of the judge's comments do not suggest that the jury could have been misled as to the gravity of their responsibility. *See Hendricks v. Vasquez*, 974 F.2d 1099, 1108 (9th Cir.1992) (*Hendricks*). Rather, if said before Dyer was actually sentenced, the judge's comments merely emphasized the importance of listening closely to the evidence. The comments did not strip from the jury a sense of responsibility for the gravity of their task. We will not overturn Dyer's conviction collaterally based on speculation as to the nature of the ex parte communication and the time at which it occurred. *See Romano*, 512 U.S. at 12-15, 114 S.Ct. at 2012-13.

The dissent cites *Driscoll v. Delo*, 71 F.3d 701 (8th Cir.1995) (Driscoll), *cert. denied*, --- U.S. ----, 117 S.Ct. 273, 136 L.Ed.2d 196 (1996), to show that the "thirteenth juror" communication in this case substantially and injuriously affected the jury's deliberations under Brecht. Dissent at 757-58. Yet in Driscoll, the prosecutor told the jury several times that it simply "recommended" a death sentence, while the judge made the ultimate decision:

> [J]uries don't sentence people to death in Missouri.... The Judge has a vote. It's really thirteen votes. But the Judge's vote is a veto vote. It doesn't matter whether you return a recommendation for the death penalty.

Driscoll, 71 F.3d at 711-12 n. 8. While the judge in this case communicated that he was the "thirteenth juror," he did so to explain why he could not socialize with the jurors. This "thirteenth juror" statement differs greatly from that in Driscoll, where the prosecutor called the judge a "thirteenth juror" only to make it easier for the jury to sentence Driscoll to death. The communication in the restaurant in no way "told the jury that it could defer the extremely difficult decision of whether or not [Dyer] should be sentenced to death." *Id.* at 713.

In any event, we hold that any prejudice that could have occurred as a result of the judge's statement was avoided by the trial court's instruction at the penalty phase. The judge specifically instructed the jury to base its sentence only on the evidence presented and that it was to disregard anything he had done or said that may have influenced its decision in any way. *See Campbell v. Kincheloe*, 829 F.2d 1453, 1461 (9th Cir.1987) (no prejudice where curative instruction given), *cert. denied*, 488 U.S. 948, 109 S.Ct. 380, 102 L.Ed.2d 369 (1988); *United States v. Madrid*, 842 F.2d 1090, 1095 (9th Cir.)

(error harmless where, among other instructions, judge instructed jury to base decision only on evidence in the case), *cert. denied*, 488 U.S. 912, 109 S.Ct. 269, 102 L.Ed.2d 256 (1988). Therefore, the judge's contact with several jurors did not have a substantial and injurious effect on the outcome.

VI

Dyer also argues that numerous errors at the sentencing phase tainted his death sentence. He contends that the penalty-phase instructions impermissibly influenced and limited the evidence that the jury could consider in mitigation. He also insists that the instructions impermissibly permitted the jury to consider nonstatutory aggravating factors. Finally, Dyer argues that the district court improperly excluded evidence of the sentences of his codefendants.

A.

Dyer presents four challenges to his penalty-phase instructions, contending that they were misleading and that there was a reasonable likelihood that the instructions prevented the jury from considering relevant mitigating evidence.

The trial court listed the statutory mitigating circumstances and instructed the jury to consider the listed factors, if applicable. First, Dyer argues that these instructions unconstitutionally enabled the jury to transform lack of mitigation into aggravation weighing in favor of death. As Dyer acknowledges, an identical argument was recently rejected in *Williams v. Calderon*, 52 F.3d 1465, 1482 (9th Cir.1995) (*Williams*), *cert. denied*, 516 U.S. 1124, 116 S.Ct. 937, 133 L.Ed.2d 863 (1996), and *Bonin*, 59 F.3d at 848. In *Bonin*, we rejected Bonin's

claim that the jury's penalty- phase instructions "allowed the juries to consider the absence of numerous possible mitigating circumstances to be aggravating circumstances." 59 F.3d at 848. We held that "[t]he cautionary words 'if applicable' [which were in both Dyer's and Bonin's instructions] warned the jury that not all of the factors would be relevant and that the absence of a factor made it inapplicable rather than an aggravating factor." *Id.* Dyer's claim is therefore meritless.

Second, Dyer argues that one of the statutory mitigating factors, which allowed the jury to consider "whether or not" Dyer was "under the influence of extreme mental or emotional disturbance," may have prevented the jury from considering Dyer's emotional condition as mitigating evidence, if that disturbance was less than "extreme." The same argument was rejected in *Blystone v. Pennsylvania*, 494 U.S. 299, 308, 110 S.Ct. 1078, 1084, 108 L.Ed.2d 255 (1990), and *Hendricks*, 974 F.2d at 1109. In Blystone, petitioner argued that an instruction that permitted the jury to consider " 'extreme' mental or emotional disturbance" impermissibly precluded the jury's consideration of less degrees of disturbance, impairment, or duress. 494 U.S. at 308, 110 S.Ct. at 1084. The Court rejected the claim because the jury was not prevented from considering relevant mitigating evidence. *Blystone* cannot be distinguished here.

Third, Dyer argues that the "catch-all" factor, permitting the jury to consider "any other circumstance which extenuates the gravity of the crime," impermissibly limited the jury's consideration of mitigating evidence to matters having to do with the crime itself. He argues that the jury may not have considered any mitigating evidence about his background, psychological make up, and work history. Again, the Supreme Court has rejected an identical argument. *Boyde v. California*, 494 U.S. 370, 381,

110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990) (analyzing identical CALJIC instruction, holding there was no "reasonable likelihood that ... jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character").

Fourth, Dyer argues that another statutory factor, "whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was impaired as a result of mental disease or defect, or the effects of intoxication," may have prevented the jury from considering evidence of intoxication because the jury had found that the evidence was not sufficient to prove diminished capacity. Dyer contends that the jury may have been confused because of some similarity between the guilt-phase and penalty-phase instructions. However, the guilt phase required "substantial impairment," while the penalty phase required mere "impairment." Dyer cannot show that there was a reasonable likelihood that the jury applied the instruction in a manner that precluded consideration of relevant mitigating evidence. *Id.* at 380, 110 S.Ct. at 1197-98. It is particularly strained to assert that because the jurors rejected a diminished capacity defense, they believed they could not consider any evidence of intoxication in mitigation.

B.

Dyer also argues that the instruction defining "aggravating circumstance" allowed the jury to consider nonstatutory aggravating factors. We are bound by the California Supreme Court's determination that there had been no violation of state law. *Dyer*, 45 Cal.3d at 77-78, 246 Cal.Rptr. 209, 753 P.2d 1; *see Williams*, 52 F.3d at 1480-81; *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 479-80, 116 L.Ed.2d 385 (1991) ("it is not the

province of a federal habeas court to reexamine state-court determinations on state-law questions"). Because the error Dyer alleges involves no independent violation of his constitutional rights, *see Barclay v. Florida*, 463 U.S. 939, 956, 103 S.Ct. 3418, 3428, 77 L.Ed.2d 1134 (1983) (nothing in Constitution prohibits consideration of nonstatutory aggravating factor); *Harris v. Pulley*, 692 F.2d 1189, 1193-94 (9th Cir.1982) (*Harris*) (rejecting argument that California death penalty statute is unconstitutional because it places no limit on introduction of aggravating factors), *rev'd on other grounds*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), his argument fails. We also reject as meritless Dyer's claim that California's statute is unconstitutional because it does not require written findings as to the aggravating and mitigating factors on which the jury relied. *Harris*, 692 F.2d at 1195-96 (rejecting identical claim).

C.

Dyer contends that at sentencing he was entitled to have the jury hear that his codefendants were sentenced to life in prison. The Supreme Court has acknowledged that such evidence can be mitigating. *Parker v. Dugger*, 498 U.S. 308, 315, 111 S.Ct. 731, 736, 112 L.Ed.2d 812 (1991). However, it does not follow that such evidence is relevant mitigating evidence in all cases. Nor does it follow that Dyer had a constitutional right to have the jury hear such evidence. Rather, a state court is free to exclude as irrelevant "evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett v. Ohio*, 438 U.S. 586, 604 n. 12, 98 S.Ct. 2954, 2965 n. 12 57 L.Ed.2d 973 (1978) (plurality). Evidence of Dyer's codefendants' sentences does not relate to his personal background or to the circumstances of the murders. The trial court held that evidence of Dyer's codefendants' sentences was irrelevant, and we will

not overturn this evidentiary ruling. The "Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings." *Romano*, 512 U.S. at 11, 114 S.Ct. at 2011.

VII

Dyer next argues that he suffered prejudice from two of the district court's evidentiary rulings. We review the district court's evidentiary rulings for an abuse of discretion, and we will not reverse unless they prejudiced Dyer. *See Bonin*, 59 F.3d at 838.

A.

Approximately one year before the district court conducted its evidentiary hearing, Dyer deposed juror Freeland for an entire day. Although the district court decided that it would hear Freeland's testimony at the evidentiary hearing, Dyer was unable to serve her with a subpoena. The district court ultimately reviewed Freeland's deposition and denied Dyer's habeas petition without hearing Freeland testify. Dyer contends that because the district court did not view Freeland's demeanor, its decision regarding Freeland's credibility was unreliable as the decision was not based on a complete record. Dyer does not contend that Freeland would have presented any evidence in addition to what she presented in her deposition. He merely alleges that his rights were infringed because the district court did not actually observe Freeland.

We analyze the district court's discretionary decision to deny a continuance by weighing various factors on a case-by-case basis. *United States v. Mejia*, 69 F.3d 309, 314-15 & 314 n. 5 (9th Cir.1995) (Mejia). Although we have used two somewhat different sets of factors in

different contexts, id. at 314 n. 5, the outcome in this case would be the same under either set. We consider:

> (1) the extent of [petitioner's] diligence in his efforts to ready his defense prior to the date set for hearing; (2) how likely it is that the need for a continuance could have been met if the continuance had been granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party, including witnesses; (4) the extent to which the appellant might have suffered harm as a result of the district court's denial.

Id. at 314 (ellipses omitted), *quoting United States v. Flynt*, 756 F.2d 1352, 1359 (9th Cir.) (*Flynt*), *amended*, 764 F.2d 675 (9th Cir.1985). The weight accorded to each factor may vary from case to case; but, "in order to obtain a reversal, appellant must show at a minimum that he has suffered prejudice as a result of the denial of his request." Flynt, 756 F.2d at 1359.

We initially discuss the first two factors. Dyer made numerous attempts to serve Freeland with a subpoena. Freeland was at home or in her neighborhood during the time Dyer attempted to serve her, yet Dyer was unsuccessful on 21 occasions. The attorney general gave Freeland's telephone number and address to Dyer. After Dyer informed the district court that he was having difficulty actually serving Freeland, the court issued a memorandum advising Dyer's counsel to "continue their efforts to serve Ms. Freeland with a subpoena if they desire to present her testimony live, in lieu of by deposition." By the third and final day of the evidentiary hearing, Dyer still had not served Freeland.

Dyer's inability to locate Freeland, combined with his inability to tell the district court when he would be able to find her, rendered the district court's decision reasonable. *Cf. Mejia*, 69 F.3d at 314, 318-19 (holding refusal to continue evidentiary hearing was abuse of discretion where, among other things, absent government witnesses were on vacation and would be available to testify in two business days). Thus, although Dyer made numerous unsuccessful attempts to serve Freeland, he could not establish that a continuance would have served any purpose. The first factor weighs in Dyer's favor, but the second factor weighs heavily against him.

In addition, the third factor weighs against Dyer. The district court would have been inconvenienced by the indefinite continuance necessary to allow Dyer to locate Freeland. Moreover, there is evidence that Dyer's counsel had been harassing Freeland.

Finally, the fourth factor weighs against Dyer because he has not demonstrated that the district court's refusal to continue the hearing prejudiced him. This case is wholly unlike *Mejia* because the district court here, unlike in *Mejia*, relied, in addition to the substance of Freeland's deposition, on the state court's own assessment of Freeland's credibility.

It was therefore within the discretion of the district court to refuse to continue an evidentiary hearing.

B.

The district court issued an order in which it clarified the evidence on which it relied in denying Dyer's petition. Dyer challenges the district court's decision to exclude as irrelevant six declarations pertaining to his behavior in prison pending trial and to the degree of his remorse.

The court did not abuse its discretion in holding that these declarations were irrelevant.

Dyer's ineffectiveness of counsel claims do not allege ineffectiveness for failing to investigate or present evidence of his behavior in jail or the degree of his remorse. Thus, the declarations were properly excluded as irrelevant.

VIII

Finally, Dyer argues that even if the alleged errors did not individually have a substantial and injurious effect on the outcome of his trial or sentence, the cumulative effect of the errors did amount to constitutional error. Although errors did occur in Dyer's trial, neither all of them individually, nor all of them together, had a substantial and injurious effect on the outcome at either the guilt or penalty phase. Dyer is asking us "to add a group of negative numbers together and find that the sum is positive," *Fairchild v. Lockhart*, 979 F.2d 636, 639 (8th Cir.1992), *cert. denied*, 509 U.S. 928, 113 S.Ct. 3051, 125 L.Ed.2d 735 (1993), and we will not do so.

AFFIRMED.

Volume 2 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED R. DYER,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden,
Respondent-Appellee.

No. 95-99002

D.C. No. CV-89-03454-VRW

ORDER AND OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Argued and Submitted
December 14, 1995—Pasadena, California

Filed May 5, 1997
Amended August 19, 1997

Before: J. Clifford Wallace, Betty B. Fletcher, and Melvin Brunetti, Circuit Judges

Opinion by Judge Wallace

Dissent by Judge Fletcher

FLETCHER, Circuit Judge, dissenting:

I respectfully dissent from the majority opinion. Alfred R. Dyer is entitled to a new trial. Despite revulsion at the hideous and senseless killings that took place in this case, we cannot abdicate our duty to examine the petitioner's trial dispassionately to determine whether he received a fair trial. The judgment we render has ramifications beyond the fate of one individual. It affects how justice will be rendered in California and the Ninth Circuit and possibly more broadly.

Because serious defects in his trial deprived Dyer of the fair trial guaranteed him by the United States Constitution, I respectfully but vigorously dissent from the majority's decision to affirm the district court's denial of Dyer's petition for a writ of habeas corpus.

I. THE BIASED JUROR

Trial by fair and impartial fact finders is the heart of what we claim justice in America is all about. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). "If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel." *United*

States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir.), *cert. denied*, 434 U.S. 818, 98 S.Ct. 58, 54 L.Ed.2d 74 (1977). "The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law." *United States v. Wood*, 299 U.S. 123, 133, 57 S.Ct. 177, 179, 81 L.Ed. 78 (1936). "Doubts regarding juror bias must be resolved against the juror." *Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir.1991).

The presence of Jessica Freeland on Dyer's jury deprived Dyer of his constitutional right to trial by an unbiased jury. We should hold that both actual and presumed bias are present in her case. Freeland lied to the court during voir dire on numerous critical matters that if answered correctly would have been the basis of challenge for cause. Her blatant lies demonstrate her actual bias and the truth of the matters she lied about are proof of both actual and presumed bias. I can imagine no more patently obvious example of why Freeland would have both presumed and actual bias than the fact that her brother was the victim of a homicide remarkably similar to the homicides for which Dyer stood trial.

A. ACTUAL BIAS: FREELAND'S DISHONESTY AT VOIR DIRE

The Supreme Court has explained that to obtain a new trial on the basis of a juror's actual bias, "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984)(plurality opinion).[1] *See,*

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1. The majority states that under *McDonough*, a showing of juror

e.g., Burton, 948 F.2d at 1159 (juror failed to disclose that husband beat her); *United States v. Colombo*, 869 F.2d 149, 152 (2d Cir.1989) (juror failed to disclose that brother-in-law was government attorney); *United States v. Scott*, 854 F.2d 697, 699 (5th Cir.1988) (juror failed to disclose that brother was deputy sheriff); *United States v. Perkins*, 748 F.2d 1519, 1531 (11th Cir.1984) (juror failed to disclose knowledge of defendant and involvement in other lawsuits); *United States v. Bynum*, 634 F.2d 768, 771 (4th Cir.1980) (juror failed to disclose that brother was convicted felon).

On federal habeas review of a state conviction, "a determination after a hearing on the merits of a factual issue, made by a State court ... shall be presumed to be correct...." 28 U.S.C. § 2254(d) (1992).[2] "[A] trial

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dishonesty is a necessary predicate to obtaining a new trial. Majority Opinion at 727-28 & n. 1. This statement is baffling for three reasons. First, five Justices in *McDonough* joined concurring opinions stating that juror dishonesty is not a necessary predicate to a finding of juror bias. 464 U.S. at 556-57, 104 S.Ct. at 850-51 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring); *id.* at 558, 104 S.Ct. at 851 (Brennan, J., joined by Marshall, J., concurring in the judgment). Second, every other circuit to consider the question has concluded that McDonough does not require a finding of juror dishonesty. *Zerka v. Green*, 49 F.3d 1181, 1186 n. 7 (6th Cir.1995); *Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir.), *cert. denied*, 506 U.S. 1000, 113 S.Ct. 602, 121 L.Ed.2d 538 (1992); *Cannon v. Lockhart*, 850 F.2d 437, 440 (8th Cir.1988). Third, the sole authority cited by the majority, *United States v. Edmond*, 43 F.3d 472 (9th Cir.1994), did not hold that a finding of juror dishonesty is a necessary predicate to a new trial, but held only that a juror's "simple forgetfulness" does not fall within "the scope of dishonesty as defined by *McDonough*." *Id.* at 474. Were dishonesty a necessary predicate I suggest it has been amply demonstrated on this record.

2. While Dyer's appeal was pending, The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, Title I, § 104, 110 Stat. 1218, amended 28 U.S.C. § 2254. All references to 28

judge's finding that a particular venireman was not biased and therefore was properly seated [is] a finding of fact subject to § 2254(d)." *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 854, 83 L.Ed.2d 841 (1985) (citation omitted); *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2892, 81 L.Ed.2d 847 (1984). Here, the trial court found that Freeland answered the voir dire questions honestly, and the California Supreme Court held that this decision was not an abuse of discretion. *People v. Dyer*, 45 Cal.3d 26, 246 Cal.Rptr. 209, 227, 753 P.2d 1, 19, *cert. denied*, 488 U.S. 934, 109 S.Ct. 330, 102 L.Ed.2d 347 (1988). However, the presumptive correctness of state court factual findings is inapplicable where, as here, "material facts were not adequately developed at the State court hearing," 28 U.S.C. § 2254(d)(3), or, also as here, "such factual determination is not fairly supported by the record." *Id.* § 2254(d)(8).

The trial judge conducted the voir dire at Dyer's trial in June 1983. The judge asked every prospective juror *inter alia* the following questions:

> 13. Have you or any of your relatives or close friends ever been the victim of *any type of crime*?
>
> 15. Have you or any of your relatives or close friends ever been accused of *any offense other than traffic cases*?

U.S.C. § 2254 are to the pre-amendment version. *Jeffries v. Wood*, 103 F.3d 827 (1996).

(emphasis added).[3] Jessica Freeland answered "no" to both questions. However, Freeland was fully aware at the time she answered to the court that she and several of her relatives had been the victims of violent crimes, and that several of her relatives had been accused of violent crimes.

The Killing of Freeland's Brother

Let us look first at the evidence concerning Jessica's brother. In October 1977, Edward Sheppard killed Jessica Freeland's brother, Richard, by shooting him in the back of the head. Abrasions on Richard Freeland's head evidenced pistol-whipping.

While Jessica Freeland claims that she answered "no" because she believed Richard's death was the result of an accident, this explanation is patently implausible. The State of California charged Sheppard with murder, and Sheppard plead guilty to voluntary manslaughter. Rosetta Freeland, the mother of Jessica and Richard, testified at Sheppard's preliminary hearing, and Sheppard paid over $1,800 in criminal restitution to the Freeland family for funeral expenses. Jessica Freeland was a named plaintiff in a wrongful death action filed against Sheppard, in which the Freeland family won $15,000. Jessica Freeland admitted that she and Richard had been "very close," Deposition of Jessica Freeland, August 18, 1993, at 32, and that the period after Richard's slaying was "a painful time in our lives." *Id.* at 53. Charles Freeland, the father of Jessica and Richard, testified that Jessica and Richard were both living with their mother and were both young adults at the time, and that Jessica and Richard were

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3. The meaning of these questions is obvious. The finding of the state court that these questions were ambiguous is thus "not fairly supported by the record." 28 U.S.C. § 2254(d)(8).

"close." Transcript, Evidentiary Hearing at 8-17. He also testified that he believed the killing was not an accident, that he did not remember anyone else in the family saying that the killing was an accident, and that Jessica was angry with him when he refused to share with her the proceeds of the wrongful death action against Sheppard. *Id.*

It defies common sense and is contrary to the overwhelming evidence to conclude that Jessica Freeland was telling the truth when she said no relative or close friend had been the victim of a crime. Jessica and Richard were close, they lived in the same house, they were both adults, and Richard's death pained Jessica. The perpetrator was charged with and pled to intentional killing. Richard's father believed the killing was intentional. To conclude that Jessica answered honestly, we must assume that in the wake of Richard's death, Jessica never learned that: 1) Sheppard pistol-whipped Richard's head, 2) Sheppard was charged with murder, 3) Sheppard pled guilty to voluntary manslaughter, 4) Sheppard paid $1,800 in criminal restitution to the Freeland family for funeral expenses, and 5) Jessica's mother, with whom Jessica lived, testified against Sheppard during the criminal proceedings. We must also assume that although Jessica was angry at her father for keeping the $15,000 proceeds of the wrongful death action against Sheppard, she had no awareness of the facts surrounding her brother's death.

Freeland and Family Members as Victims

I turn now to evidence that other family members, including Jessica Freeland herself, were victims of crimes. Jessica Freeland was assaulted at knife point by her twelve-year-old, mentally disturbed cousin Buddy. She was lying on a couch when Buddy approached her with a knife and pulled her underwear off. There was a struggle,

and Buddy "scared the hell out of" Freeland. Afterwards, Freeland's father called the police. Freeland later described the incident as a "sexual assault" and recognized that she had been "attacked." Freeland Deposition at 60, 65.

Freeland claims that she answered "no" during voir dire because the incident was "not anything that I think could be considered like a violent crime that had a major effect on me and I'm still reeling...." *Id.* at 129. However, the question was not whether Freeland was the victim of a violent crime that deeply affected her, but whether Freeland was the victim of "any type of crime." Freeland herself described the incident as an "attack" and a "sexual assault."

Freeland's home was burglarized on "at least" three separate occasions. One incident that Freeland reported "really stands out in my mind" was when the burglars "took a lot of food and threw it on the floor and killed our fish and kind of trashed the house." In another incident, "[o]ur back door was kicked in." Each time, valuables were taken and the burglars were never caught. *Id.* at 53-54. Moreover, her cars were burglarized on so many different occasions that she could not keep the burglaries straight in her mind: "I think the red car was burglarized, but I can't remember for sure. I've had too many burglaries." *Id.* at 68.

When asked why she answered "no" on voir dire even though she knew that she had been the victim of multiple burglaries of her home and car, Freeland answered:

> I didn't have time to rack my brain to remember every time my car or house had been burglarized and it didn't have a bearing on the case to me because if you live in Oakland, I don't know of

> anyone who lives in Oakland who has never been burglarized. It's just a way of life and it's just the way things go. It was not a traumatic event that caused me to be so bitter that I would irrationally try to pay back someone like Alfred Dyer who has evidently done burglaries or robberies.

Id. at 124. Freeland lied to the court. Her attempt at minimalization of the burglaries and rationalizations do not erase the lies. The court, not the prospective juror, makes the determination of whether victimization by burglary is cause for striking a juror. Likewise, whether Freeland felt she had time to answer the court's questions was not her decision to make. The fact that Freeland lived in Oakland rather than Pacific Heights does not change the fact that she was a victim of crimes. Indeed, at least four other potential jurors from Oakland reported burglaries against them to the court. Whether Freeland could be fair despite her victimization was not hers to decide.

Family Members as Criminals

I turn now to the evidence belying her response that no family members had been accused of crime. In 1970, Jason Caldwell, Freeland's maternal uncle, was arrested and charged with murder. In 1978, Caldwell was charged with armed robbery. Caldwell lived with Freeland's family on several occasions. Although Caldwell was acquitted of murder, the question was whether a relative had been *accused* of a crime. Freeland admitted that she was aware of the criminal charges. When asked why she didn't disclose this information, Freeland answered: "Am I to reveal everything, the little information I know about other relatives? That's ridiculous. If that's what they wanted and you feel I have been unfair by not saying a

distant relative has done something, then let Alfred Dyer get a new trial." *Id.* at 134-35. An uncle who lived with the family from time to time is not a "distant relative." He is "a relative" and close at that. The question pertained to "any of your relatives."

On May 5, 1983, less than a month before voir dire, Melvin Provost, Freeland's estranged husband, was arrested on rape charges. Provost was ultimately sentenced to six months imprisonment and another 30 months probation.

Explaining her "no" answer given at voir dire, Freeland stated:

> When I found out Melvin was in trouble either the case was already over or we were already past voir dire.... And I never read anything that said, "Okay, now somebody in my family is arrested and now I'm supposed to tell everything." Melvin is not a member of my family.

Id. at 10. It is difficult to believe that Freeland did not know about her husband's arrest at the time of voir dire. Freeland stated at voir dire that her name was "really" Mrs. Provost and answered to that name, Trial Transcript, *People v. Dyer*, (No. 72540), at 780, she visited Provost within a week of the time she claims she heard about his arrest and she continued to give him money after they separated. Her claim that Provost was not a member of her family is equally specious. At the time of her voir dire questioning, Freeland had observed other prospective jurors claim as kin "ex-in-laws" and a brother-in-law. It is implausible that Freeland thought that the court would not consider her separated husband to be a member of her family.

When asked at a post-verdict deposition whether her father "ever had any problems with the law," Freeland answered: "He kidnaped [sic] us one time and the police finally caught up with us and he was arrested." Freeland Deposition at 64. This incident was part of a divorce dispute between Freeland's parents. At her deposition, Freeland considered the incident to be a "problem with the law"; at voir dire, apparently she did not.

On May 27, 1983, just days before the voir dire, the state of California arrested and charged Freeland's brother, Billy, with narcotics distribution. Billy Freeland had previously been charged with possession of brass knuckles, and with repeated juvenile offenses. When asked whether she knew of the drug distribution charges against Billy Freeland, Jessica Freeland did not answer directly. She stated that she "love[d]" and was "close to" her brother, but that "I can't imagine a sister or brother knowing every possible act that the other was doing."[4] *Id.* at 103.

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4. Freeland's post-conviction behavior lends further doubt that Freeland could lie about all these matters and still be a fair juror. Freeland has twice used her position as an employee of the California Department of Corrections to review the contents of Dyer's prison file, though prison regulations expressly forbid such conduct. Freeland worked on death row at San Quentin while Dyer was there; she claims she did not know it at the time. Freeland admits having attended "at least one" court proceeding connected to Dyer's post-conviction appeals; she claims she follows the case only because of harassment by Dyer's counsel. Even more disturbing, when Dyer's counsel attempted to secure Freeland's attendance at the evidentiary hearing before the federal district court, Freeland apparently evaded 21 separate attempts to serve her with a subpoena. The federal court hearing would have been the first time that a judge would have observed Freeland's demeanor when confronted with the deposition testimony that showed the discrepancies between her voir dire answers and the facts.

This Court's Standard of Review

For two reasons, we need not presume the correctness of the finding by the state trial judge that Freeland answered the voir dire questions honestly: first, "such factual determination is not fairly supported by the record," 28 U.S.C. § 2254(d)(8); and second, "material facts were not adequately developed at the State court hearing." 28 U.S.C. § 2254(d)(3). As to the first, considered both separately and together, the crimes against Freeland and her family, the crimes committed by her immediate relatives, and the evidence of Freeland's knowledge of these crimes lead to the inescapable conclusion that Freeland lied to the court during voir dire. From Freeland's own mouth is admission that she lied to avoid furnishing information: "I dislike giving information, period. Information that to me is not relevant." *Id.* at 71.

The majority argues that the fact that Freeland is from "a crime-ridden community ... plausibly both affects her understanding of what qualifies as a crime and influenced her answers to Questions 13 and 15." Majority Opinion at 729. I find this specious. Where Freeland lived cannot excuse her glib "no," her failure to mention her family's involvement, both as victims and perpetrators, in the crimes of homicide, rape, armed robbery, kidnapping, sexual assault, burglary, and drug dealing. The victims of such crimes suffer no less because they live in the city and not the suburbs, and the perpetrators are no less criminals. Imagine the reception in a money-laundering trial of the argument that the defendant had no idea that the burglary of an Oakland residence, which produced the money to be laundered, was a crime. See 18 U.S.C. § 1956(a)(1) (one element of money laundering is "know[ledge] that the property involved in a financial transaction represents the proceeds of some form of unlawful activity"). Yet when Jessica Freeland claims

that she did not realize that burglary fell within the term "any type of crime," the majority agrees that burglary in Oakland may not be thought of as a crime.[5]

Moreover, we should not defer to the state court's finding that Freeland was honest because the court did not adequately develop the material facts. At the post-trial hearing before the state court trial judge, Freeland claimed that she answered "no" because she thought the death of her brother was an accident. Transcript, Post-trial Hearing, at 2709. The judge found no "lack of candor." *Id.* at 2714. When counsel for the defense cited the parallels between her brother's death and the instant case, the state court responded, "There's no foundation establishing how well she knew the brother. We have brothers and we have brothers." *Id.* We now know that Jessica and Richard were close.

Even worse, the relevant evidence concerning the circumstances of Richard's death was not part of the record. The court did not learn that Freeland's mother testified at Sheppard's criminal trial, that Sheppard was charged with murder and pled guilty to voluntary manslaughter, that Sheppard paid Freeland's family $1,800 in criminal restitution, that Freeland was a named plaintiff in a wrongful death action against Sheppard, that the action yielded $15,000, and that Freeland was angry when her father refused to share the proceeds. Nor did the court develop the evidence later revealed in depositions of the sexual assault and multiple burglaries committed against Freeland, or the serious crimes charged against her several immediate relatives.

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5. The majority fails to take into account that Freeland, herself, worked for the California Department of Corrections.

The California Supreme Court did not remand to allow the development of a better record. While the court specifically considered what evidence it had of the wrongful death action, Dyer, 246 Cal.Rptr. at 227, 753 P.2d at 19, it did not have before it the salient facts. It mentioned the existence of but did not analyze the evidence pertaining to the other crimes and victims and perpetrators. *Id.* at 228, 753 P.2d at 20. Moreover, the court's review was for an abuse of discretion. Without the critical evidence, its review could not be meaningful.

In short, Jessica Freeland "failed to answer honestly [several] material question[s] on voir dire." *McDonough*, 464 U.S. at 556, 104 S.Ct. at 849. Dyer thus satisfied the first element of the plurality's test in McDonough. As to the second element, (embraced by a majority) "a correct response [by Freeland to the voir dire questions] would have provided a valid basis for a challenge for cause." *Id.* Had Freeland answered the voir dire questions honestly, the court would have known that Freeland's brother had been shot in the back of the head after being pistol-whipped about the head, just as was one of the victims in this case. It would have known also that Freeland had been the victim of sexual assault, kidnapping, and numerous burglaries, and that three of her relatives had been accused of serious crimes: her uncle of murder and armed robbery, her estranged husband of rape, and her brother of distributing narcotics. Dyer's trial counsel have testified that if they had known this information at the time, they would have moved to strike Freeland for cause. Given the breadth and the depth of Freeland's personal experiences with violent crime, and the extraordinary parallels between one of these experiences and the crime at bar, Freeland's honest answers to the voir dire questions "would have provided a valid basis for a challenge for cause."

B. IMPLIED BIAS: THE SLAYING OF RICHARD FREELAND

As an alternative to actual bias as grounds for disqualification, "bias [can] be implied or presumed from the 'potential for substantial emotional involvement, adversely affecting impartiality,' inherent in certain relationships." *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir.1990) (quoting *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977)), *cert. denied*, 498 U.S. 1091, 111 S.Ct. 974, 112 L.Ed.2d 1059 (1991). "That [people] will be prone to favor that side of a cause with which they identify themselves either economically, socially, or emotionally is a fundamental fact of human character." *Allsup*, 566 F.2d at 71 (quoting *Kiernan v. Van Schaik*, 347 F.2d 775, 781 (3d Cir.1965)). While "[t]he Supreme Court has never explicitly adopted or rejected the doctrine of implied bias," *Tinsley*, 895 F.2d at 527, five Justices in *McDonough* joined concurring opinions stating that a court may grant a new trial upon a finding of implied bias. 464 U.S. at 556-57, 104 S.Ct. at 850-51 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring); *id.* at 558-59, 104 S.Ct. at 851-52 (Brennan, J., joined by Marshall, J., concurring in the judgment).

We determine de novo the existence of implied bias. As Justice O'Connor has explained, a court that applies the implied bias doctrine need not be deterred by 28 U.S.C. § 2254(d) because "state-court proceedings resulting in a finding of 'no bias' are by definition inadequate to uncover the bias that the law conclusively presumes." *Smith v. Phillips*, 455 U.S. 209, 222-23 n. *, 102 S.Ct. 940, 949 n. *, 71 L.Ed.2d 78 (1982) (O'Connor, J., concurring). *See Wood*, 299 U.S. at 133, 57 S.Ct. at 179 (implied bias is "conclusively presumed as matter of law"); *Burton*, 948 F.2d at 1158 ("Whether a juror's bias may be implied from the circumstances is a question of law for

this court."); *Cummings v. Dugger*, 862 F.2d 1504, 1509 (11th Cir.) ("Although the Supreme Court has not directly addressed the standard of review for a claim of presumed prejudice, this Circuit has treated the standard as a mixed question of fact and law."), *cert. denied*, 490 U.S. 1111, 109 S.Ct. 3169, 104 L.Ed.2d 1031 (1989).[6]

We have twice granted a new trial on the basis of a juror's implied bias. In *Allsup*, we presumed that two prospective jurors in a bank robbery trial were biased because they were employed by the bank that had been robbed, though they worked at a different branch. 566 F.2d at 71. We explained: "The employment relationship coupled with a reasonable apprehension of violence by bank robbers leads us to believe that bias of those who work for the bank robbed should be presumed." *Id.* at 71-72. In *United States v. Eubanks*, 591 F.2d 513 (9th Cir.1979), we presumed that a juror at a heroin distribution trial was biased because his two sons were heroin addicts who were in prison for crimes committed to obtain more heroin. We explained: "Regardless of the reason for [the juror's] nondisclosure, we conclude that his sons' tragic involvement with heroin bars the inference that Collins served as an impartial juror." *Id.* at 517. *Cf. Tinsley*, 895 F.2d at 529 (no implied bias where juror at rape trial once provided professional counseling services to rape victim).

Other circuits have likewise reversed convictions on the basis of implied bias. *See Burton*, 948 F.2d at 1159 (10th Cir.) (juror disqualified from trial involving battered woman syndrome defense because she had herself been battered); *Jackson v. United States*, 395 F.2d 615

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6. We did not address the standard of review to be applied in implied bias cases in *Tinsley*, 895 F.2d at 526-29.

(D.C.Cir.1968) (at trial of man who murdered his wife upon discovering affair, juror disqualified who previously had affair with a woman murdered by her husband); *United States ex rel. De Vita v. McCorkle*, 248 F.2d 1 (3d Cir.1957) (en banc) (juror who himself had been victim of a robbery disqualified from robbery trial), *cert. denied*, 355 U.S. 873, 78 S.Ct. 121, 2 L.Ed.2d 77 (1957).

Here, Freeland's brother was pistol-whipped about the head, and then shot in the head. Evidence adduced at Dyer's trial indicated that Dyer pistol-whipped Bennie Warren about the head, and then shot him in the head. The similarities are extraordinary. Moreover, Freeland herself had been the victim of a sexual assault and of so many burglaries that she could no longer distinguish among them in her mind. The crime against Richard, as well as the crimes against Freeland herself, certainly made Freeland as problematic a juror as the bank employees at the bank robbery trial in *Allsup*, or the father of the jailed heroin addicts at the heroin distribution trial in *Eubanks*. The court should presume bias.

The majority concedes that at "first glance, it seems extraordinary" that the two homicides are so similar, but argues that "considering the alleged rate of crime in Freeland's neighborhood, her situation is not so surprising or extraordinary." Majority Opinion at 731. However, when a brother is slain by a bullet in the back of the head, the majority should not presume that the tendency of the surviving sister to suffer deep and abiding grief and anger is diminished by the local crime rate. Bullets may fly with disproportionate frequency in Freeland's neighborhood, but she is presumed to be as likely as anyone wherever she lives to be affected by the parallels between the slaying of her brother and the slaying of Bennie Warren.

The majority curiously argues that "[a]lthough her brother was killed by a gunshot wound to the head, she also has relatives who have been convicted of crimes. Thus, Dyer has not shown that she would have been biased for or against him." Majority Opinion at 731. The rationale seems to be that the crimes committed by and against Freeland's family simply cancel each other out. The majority gives no special weight to the similarities in the intentional slaying of Richard Freeland by pistol whipping and a bullet to the brain and Bennie Warren's like fate. Needless to say, there is no support in the cases for the majority's novel approach. Indeed, we presumed in *Eubanks* that a juror whose sons were in prison would be prejudiced against the defendant. 591 F.2d at 517; *see also Burton*, 948 F.2d at 1159 (presuming the victim of battery would be biased against a woman who killed her batterer).

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Trial counsel is unconstitutionally ineffective when performance is deficient and the defense is prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The former element requires proof that "counsel's representation fell below an objective standard of reasonableness," *id.* at 688, 104 S.Ct. at 2064, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. We review de novo a claim of ineffective assistance of counsel. *Moran v. Godinez*, 57 F.3d 690, 699 (9th Cir.), *cert. denied*, 516 U.S. 976, 116 S.Ct. 479, 133 L.Ed.2d 407 (1995).

Dyer's trial counsel, John Burris, failed to investigate and present evidence of Dyer's PCP use on the night of the crime, although proof of using PCP would have been

potent evidence to support a defense that Dyer's mental state on the night of the killings precluded him from forming an intent to kill.[7]

Competent counsel would have presented evidence to the jury that just hours before committing bizarre acts of violence Dyer smoked a "sherm," *i.e.*, a cigarette laced with PCP (phencyclidine). Since Dyer took the stand to testify regarding his use of other drugs, he could have testified that he accidentally used PCP that night (he had revealed this to Dr. Smith). Charles Howard would have confirmed this and was willing to testify that he shared a sherm with Dyer that night. Delphine Dismuke stated in a signed declaration that Dyer came to a party at her home that night, that some of her guests smoked sherms, that Dyer suddenly became uncharacteristically violent, and that she believed he had smoked PCP.[8] She was available to testify. Tyrone Ario would have testified that during Dismuke's party, Dyer suddenly became uncharacteristically violent.[9] Robert Fluker (Nora Fluker's brother-in- law) would have testified under subpoena that when he ran into Dyer between the party

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7. Under California law, evidence of mental disease, disorder, or defect is admissible on the issue of whether the accused actually formed an intent to kill-i.e., whether the accused actually formed express malice. *People v. Saille*, 54 Cal.3d 1103, 2 Cal.Rptr.2d 364, 374, 820 P.2d 588, 596 (1991).

8. Dismuke stated: "At one point, [Dyer] suddenly began acting wild. He picked a fight with my brother Roger, who was [Dyer's] friend. It was very unusual for [Dyer] to act in this crazy way." Declaration of Delphine Dismuke, March 7, 1989, at 2.

9. Ario stated, "All of a sudden, [Dyer's] actions changed completely. He started picking a fight.... [His] eyes were wild, he was waving his arms and shouting and threatening violence. I had never seen [Dyer] act like this before." Declaration of Tyrone Ario, January 7, 1989, at 2.

and the killings, Dyer appeared to be on PCP. The transcripts of the trials of Dyer's co-felons contain further corroborative evidence.[10]

PCP, a drug with unique and overwhelming effects,[11] can best explain Dyer's uncharacteristic and psychotic behavior. The most rudimentary of investigations by Burris would have revealed the needed

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10. Defendant Michael Jackson testified that people were smoking sherms at Delphine Dismuke's party, and that Dyer was subsequently frightened, blank-looking, shaking, sweating, and uncharacteristically violent. Jackson stated, "I never seen him upset or strange like he was that night.... [H]e looked like he was in a trance, like he was--his body was there, but he wasn't there." Trial Transcript, *People v. Jackson*, (No. 74170), at 467. Defendant Cleveland Ario testified that Dyer was "tripping," shaking, trembling, and sweating. Trial Transcript, *People v. Ario*, (No. 71381), at 11. Bennie Warren, a survivor of the crime, testified that "[h]e seemed like he had turned into a [Mr.] Hyde.... An entirely different person." *Id.* at 253.

11.

> PCP is a dissociative anesthetic, which means that it impairs normal cognitive brain function. The user performs physical activities without judgment or reasoning. PCP produces a mental state in which the recipient is oblivious to what is happening to his or her body.... Because the individual who has consumed PCP is dissociated from normal cognitive reasoning, bizarre and impulsive behaviors often occur, including spontaneous violence.

Declaration of Ferris N. Pitts, Jr., M.D., May 27, 1994, at 7. The use of PCP can induce "random, detached, inappropriate violent acts. It is particularly associated with bizarre episodes of violent behavior." Declaration of Kate McColl Bell, M.D. (known as Kate Yago at the time of trial), Dec. 26, 1994, at 8-9. "PCP is more potent pharmacologically than alcohol, marijuana, cocaine or heroin. The ingestion of these other drugs may exacerbate the effects of PCP, but the effects of the PCP will be dominant." Pitts Declaration at 9.

information for a defense based upon Dyer's use of PCP. There is a reasonable probability that a jury properly informed of Dyer's PCP use would have returned a conviction less than first degree murder or a sentence less than death. We should find that Burris provided unconstitutionally ineffective assistance of counsel. *See In re Cordero*, 46 Cal.3d 161, 249 Cal.Rptr. 342, 354-58, 756 P.2d 1370, 1382-86 (1988) (defense counsel ineffective for failure to investigate and present evidence of defendant's use of PCP); *People v. Frierson*, 25 Cal.3d 142, 158 Cal.Rptr. 281, 289-93, 599 P.2d 587, 596-600 (1979) (defense counsel ineffective for failure to investigate and present evidence of defendant's use of angel dust); *cf. Wade v. Calderon*, 29 F.3d 1312, 1318-19 (9th Cir.1994) (defense counsel not ineffective for declining to use PCP defense where "there was no evidence that [the defendant] ingested PCP on the day of the offense"), cert. denied, 513 U.S. 1120, 115 S.Ct. 923, 130 L.Ed.2d 802 (1995).

A. PREJUDICE

PCP would explain Dyer's surprising ability to take a nap immediately after injecting himself with "speedballs," a mixture of heroin and cocaine. "Consistent with the anesthetic effect of PCP, it is common for an individual intoxicated with PCP to fall asleep or otherwise appear to 'pass out.' " Pitts Declaration at 8. "PCP use could explain Mr. Dyer's apparent ability to sleep for a period of several minutes, despite his ingestion of stimulants. PCP is a powerful dissociative anesthetic, which was originally employed in anesthesia for surgery...." Bell Declaration at 10.

PCP would explain Dyer's partial memory loss: Dyer testified that he remembered pistol-whipping Bennie Warren, did not remember forcing the four victims into the car at gun point, remembered sitting in the car and

then getting out and hearing gun shots, and did not remember anything else until the next morning. "PCP users frequently suffer true pharmacological amnesia.... [T]he PCP user may remember only some of his actions." Pitts at 8.

> PCP use could explain his inability to fully recall events at the time of the crime. PCP is severely disruptive to learning and memory; users frequently suffer true pharmacological amnesia as to their behavior in a drug-altered state. This amnesia may affect the ability to recall an entire incident or select portions of the activity and behavior. Thus, Mr. Dyer's inability to recall events for a thirty-minute period is consistent with PCP use.

Bell Declaration at 10.

PCP would also explain Dyer's apparent goal-oriented behavior. While a person on PCP "may perform gross and fine motor functions" and may be able to "describ [e] what he or she is doing or about to do," he or she may be "disconnected from an appreciation of the nature and quality of the act." Pitts Declaration at 8. "Lay observers might well be unable to discern from Mr. Dyer's physical appearance and actions his level of cognitive impairment. Mr. Dyer's apparent 'goal-oriented' behavior could be consistent with his being under the influence of, and being severely impaired by, PCP." Bell Declaration at 9-10.

The state's impeachment of the defense's drug expert, Kate Yago (Bell), M.D., demonstrates the prejudice from the absence of PCP evidence. Burris engaged Yago to express an opinion on the mental effects of alcohol, marijuana, cocaine, and heroin. Burris hired Yago on June 16, 1983, five weeks into the trial and only ten days

before Yago had to take the stand, so Yago was completely dependent on Burris for information about the night in question. Burris neglected to inform Yago that Dyer had used PCP that night, though he had been so informed by Dr. Smith. When the state asked Yago on cross- examination how she could explain Dyer's memory loss, given Dyer's use of speedballs and his subsequent actions, Yago answered, "I can't." Yago subsequently stated that if she had known about Dyer's PCP use, she would not have made this highly damaging admission.

Compared to the other drugs Dyer used on the night of the crime, PCP is of a different order of magnitude in its ability to alter the personality, impair cognitive and volitional functions, dissociate a person from his actions, and induce violence. PCP can best explain Dyer's ability to take a nap immediately after shooting up, his partial memory loss, and his apparent goal-oriented behavior. There is a reasonable probability that a jury properly informed of these facts would have returned different verdicts. We should find prejudice.

B. DEFICIENT PERFORMANCE

Burris' inadequate investigation of Dyer's PCP use during the night of the crimes, and his failure to present any PCP evidence to the jury at either phase of the trial, falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064.

Burris knew that Dyer used PCP during the night of the crime. *See Dyer v. Calderon*, No. C-89-3454-VRW, op. at 25 (N.D.Cal. Dec. 12, 1994) ("It is undisputed that Burris had some indication that evidence of PCP might be relevant to Dyer's defense."). When David Smith, M.D., met with Dyer in July 1982, he learned that Dyer used PCP on the night of the crime. Smith passed this

information along to Burris, but Burris "didn't seem that interested in what I had to say." Transcript, Evidentiary Hearing, at 2-432. Burris' handwritten notes clearly contain the words "PCP" and "sherm." When confronted with these notes, Burris admitted that "I certainly operated upon the assumption, I believe, that he smoked [PCP]." Deposition of John L. Burris, May 19, 1994, at 89. At Dyer's evidentiary hearing one month later, Burris backed away from this interpretation of his notes, stating: "The indication was that Mr. Dyer had not [smoked a sherm], but that certainly was an open question." Even if Dyer's use of PCP was an "open question," Burris could have settled the matter by simply asking Dyer if he smoked a sherm.

Burris conducted only a superficial investigation of Dyer's drug use; even worse, he conducted no investigation whatsoever of Dyer's PCP use. In a letter to a professional investigator, Burris raised the possibility that Dyer had "consumed alcohol and smoked marijuana or dope," but neglected to mention PCP. When Burris sent Timothy Bluitt, one of his law clerks, to question witnesses, he instructed Bluitt to gather character evidence and did not even mention the significance of Dyer's drug use to the defense. As a direct result of this oversight, when Bluitt spoke with two witnesses who would have persuasively testified that Dyer used PCP hours before the crime--Charles Howard and Delphine Dismuke--Bluitt asked no questions and accordingly received no information about Dyer's drug use. When Bluitt, an agent of the court, inquired only about Dyer's character, Charles and Delphine probably believed that telling what they knew about Dyer's use of PCP would hurt Dyer.

Burris never uttered the word "PCP" before the jury, though there is a reasonable probability that PCP evidence would have made a difference at either the guilt

phase or the sentencing phase or at both. Very disturbing is the fact that Burris neglected to share his PCP information with the defense's drug expert, Dr. Yago. This failure led directly to Yago's highly damaging and totally unnecessary admission that the drugs she was aware of that Dyer had consumed that night could not explain his memory loss.

The majority argues that Burris' failure to investigate and present evidence about Dyer's PCP use was a legitimate "tactical decision." Majority Opinion at 733-35. It is true that "[t]actical decisions that are not objectively unreasonable do not constitute ineffective assistance of counsel." *Hensley v. Crist*, 67 F.3d 181, 185 (9th Cir.1995). However, Burris simply made no decision whatsoever, reasonable or otherwise, regarding PCP because it never occurred to him that PCP had any special significance to a defense based upon the inability to form an actual intent to kill. In post-conviction depositions, Burris claimed that "[PCP] would just have been more drugs," Transcript, Evidentiary Hearing, at 2-212, did not know the difference between LSD and PCP, and claimed that the effects of PCP would have worn off during the three or four hours between the sherm party and the homicides.[12] These statements demonstrate an alarming ignorance of the effects of and elementary distinctions between the drugs involved in the case. Minimal standards of professional competence require that a lawyer who is arguing a defense based upon the incapacity to form an intent to kill learn the basic characteristics of all of the drugs he has reason to suspect the defendant used. Burris did not meet these minimal standards. Burris did not understand the significance of PCP to his own defense. He simply did not

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12. To the contrary, "[t]he disinhibiting and dissociative effects of PCP would have persisted for 24 hours or longer after Mr. Dyer ingested it." Pitts Declaration at 6.

take the time or have the time to grasp the essentials of the best defense he could present in this death penalty case.[13]

III. THE *BEEMAN* ERROR

Dyer was found guilty of all counts charged against him: first degree murder of Nora Fluker, first degree

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13. Bluitt described Burris' preparation for Dyer's trial as follows:

> Mr. Burris, the only litigation lawyer in the office, maintained a hectic caseload. The constant demands of Mr. Burris's trial schedule left little time for reviewing assignments with him. I constantly found it difficult to schedule time with Mr. Burris and our conversations were usually brief and often interrupted with other matters....
>
> I attempted to relay the information that I had learned [from interviewing witnesses] to Mr. Burris. But invariably, because Mr. Burris rarely had time for me due to the demands of his other cases, the most I would be able to report to him was that I had spoken to the witness. I was never able to provide an oral report to Mr. Burris about the substance of the interview. Thus, he was never able to instruct me on follow-up questions for the witness that I had interviewed or guidance for questioning future witnesses....
>
> Mr. Burris was under a tremendous amount of pressure and stress in the months preceding Mr. Dyer's trial. During the entire time that I worked for Mr. Burris [summer 1982 through June 1983], there were an overwhelming number of cases--many of which were high profile, complex cases--that placed endless emotional, physical, and intellectual demands on Mr. Burris.

Declaration of Timothy Bluitt, May 26, 1994, at 1-6.

murder of Floyd Murray, attempted murder of Belinda Murray, attempted murder of Bennie Warren, and kidnapping of Fluker, Floyd Murray, Belinda Murray, and Warren. The judge instructed the jury as to each count that Dyer could be found guilty if he directly committed the crime or if he aided and abetted its commission. The judge instructed generally as to aiding and abetting liability, making the instruction applicable to Dyer's charges of first degree murder of Fluker and Floyd Murray, attempted murder of Belinda Murray and Warren, and kidnapping of the four victims. The court instructed the jury as follows: "A person aids and abets the commission of a crime if with knowledge of the unlawful purpose of the perpetrator of the crime he intentionally aids, promotes, encourages or instigates by act or advice the commission of such crime."

In *People v. Beeman*, 35 Cal.3d 547, 199 Cal.Rptr. 60, 674 P.2d 1318 (1984), the California Supreme Court held that such an instruction is unconstitutionally infirm because it allows a jury to convict the defendant as an aider and abetter without necessarily finding that the defendant intended to encourage or facilitate the offense with which the principal was charged.[14] On direct review of Dyer's conviction, the California Supreme Court held that the instructions at Dyer's trial were flawed by *Beeman* error, but concluded that the error was harmless. *Dyer*, 246 Cal.Rptr. at 231, 753 P.2d at 23.

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14. In *Beeman*, the Court concluded that "an appropriate instruction should inform the jury that a person aids and abets the commission of a crime when he or she, acting with 1) knowledge of the unlawful purpose of the perpetrator, 2) the intent or purpose of committing, encouraging or facilitating the commission of the offense, 3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." *Dyer*, 246 Cal.Rptr. at 228, 753 P.2d at 20 (citing *Beeman*, 199 Cal.Rptr. 60, 674 P.2d 1318).

On federal habeas review, *Beeman* error is subject to the harmless error review of *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946): "whether the error 'has substantial and injurious effect or influence in determining the jury's verdict.'" *California v. Roy*, 519 U.S. 2, ----, 117 S.Ct. 337, 338, 136 L.Ed.2d 266 (1996) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993)). In *Roy*, the Court further elaborated that "where a judge, in a habeas proceeding, applying this standard of harmless errors is in grave doubt as to the harmlessness of an error, the habeas petitioner must win." *Id.* (citing *O'Neal v. McAninch*, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)) (internal quotations omitted).

The majority concludes that the Beeman error at Dyer's trial was harmless, asserting that "[n]o evidence in the record could support a finding" that Dyer did not intend to kill Nora Fluker, and that "no evidence supports a finding that Dyer lacked the specific criminal intent to assist in Floyd [Murray]'s murder." Majority Opinion at 738. Under *Roy*, however, our inquiry is whether the misdescription of a key element of the crime of aiding and abetting, the omission of specific intent to commit, encourage, or facilitate the confederate's crime, *Roy*, 519 U.S. at ----, 117 S.Ct. at 337, places us in grave doubt as to the harmlessness of that error's effect upon the jury's verdict. It does.

The faulty instructions were given with regard to both "the commission or attempted commission of a crime." Thus, the jury could have found Dyer guilty of each of the charges on either an aiding and abetting theory, or for directly and personally committing the offenses. Because the verdict forms did not specify whether Dyer was guilty as a principal or as an aider and abetter we cannot know

from the verdicts themselves upon which theory the jury relied.

We do know that the jury found that Dyer did not cause great bodily injury to either Floyd Murray or Belinda Murray,[15] so we know that the jury convicted Dyer of the murder of Floyd Murray and the attempted murder of Belinda Murray only as an aider and abetter. The jury also found that Dyer intentionally caused great bodily injury to Nora Fluker and Bennie Warren. However, we cannot know whether the jury convicted Dyer of the murder of Nora Fluker and the attempted murder of Bennie Warren as a principal or as an aider or abetter because the jury forms do not make this explicit. As the state trial court found, this finding could support either an aiding and abetting or a direct liability theory by the jury.

The California Supreme Court held, and the majority agrees, that the issue only affects the Floyd Murray murder count, as the jury found that Dyer "personally murdered" Nora Fluker, and intended to kill both Bennie Warren and Belinda Murray. Majority Opinion at 737-38. To reach this conclusion, the majority had to assume that the jury found that Dyer personally murdered Fluker and intended to murder Warren and Belinda Murray, yet the jury's findings support either direct or aiding and abetting liability and we cannot know which. The jury only found that Dyer personally inflicted and intended to inflict great bodily injury on Fluker and Warren; California law does not allow us to presume intent to kill from the intentional infliction of great bodily injury. *See People v. Ratliff*, 41 Cal.3d 675, 224 Cal.Rptr. 705, 716-17, 715 P.2d 665, 676-77 (1986).

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15. Indeed, the prosecutor admitted that the evidence could not establish beyond a reasonable doubt that Dyer shot Floyd Murray.

There are no findings by the jury that demonstrate that the jury found that Dyer had the intent to facilitate the murder or attempted murder of any of the four victims. The jury could have found that Dyer had different intents towards different victims, or changed his mind in the middle of the incident, or for any other reason lacked the requisite intent. Perhaps the jury simply ignored the question of Dyer's intent altogether, which is precisely the danger of *Beeman* error.

The *Beeman* error is harmful in this case under the *Roy/Kotteakos* standard because it "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623, 113 S.Ct. at 1714. As a reviewing court, we are unable to conclude that the jury considered Dyer's intent at all, let alone made any findings of intent. In this situation, a conscientious judge can only be "in grave doubt as to the harmlessness of the error," *O'Neal v. McAninch*, 513 U.S. 432, 437, 115 S.Ct. 992, 995, 130 L.Ed.2d 947 (1995). I would grant a new trial on this ground.

IV. EX PARTE COMMUNICATIONS

Two improper ex parte communications tainted the penalty phase of Dyer's trial, one between a witness and three jurors, the other between the judge and several jurors. Each independently is grounds for entitling Dyer to new penalty proceedings.

A. EX PARTE CONTACT WITH A WITNESS

Bennie Warren, who survived bullet wounds inflicted by Dyer on the night of the crime, testified at Dyer's trial. According to Rick Bartholomew, the jury foreman, Warren approached Bartholomew and two other jurors outside the courthouse after a day of the trial and said

"something to the effect of 'Hang him.' " Deposition of Rick Bartholomew, August 11, 1993, at 5.

"In order to safeguard an accused's constitutional right to an impartial jury, private communications between jurors and witnesses are absolutely forbidden." *United States v. Williams*, 822 F.2d 1174, 1187 (D.C.Cir.1987) (footnote omitted); *see also Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954) (forbidding, "[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury"); *Mattox v. United States*, 146 U.S. 140, 150, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1892) (forbidding "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge"). Warren's out-of-court communication with three of the jurors, urging hanging, the ultimate issue to be determined at the sentencing phase, violates the prohibition against ex parte communications with the jury and is clearly prejudicial.

Such error is trial error, reversible if it had a substantial and injurious effect or influence in determining the jury's verdict. *Thompson v. Borg*, 74 F.3d 1571, 1574-75 (9th Cir.) (quoting *Brecht*, 507 U.S. at 629, 113 S.Ct. at 1717), *cert. denied*, --- U.S. ----, 117 S.Ct. 227, 136 L.Ed.2d 159 (1996). We frequently have held that ex parte communication between third parties and the jury was prejudicial and grounds for a new trial. *Lawson v. Borg*, 60 F.3d 608, 610 n. 2, 612-13 (9th Cir.1995) ("substantial and injurious effect" found where one juror told others he heard the defendant "had a violent temper"); *United States v. Maree*, 934 F.2d 196, 201-02 (9th Cir.1991) (for purposes of motion for new trial, actual prejudice found where juror receives ex parte advice from juror's friends regarding petitioner's guilt); *see also*

Dickson v. Sullivan, 849 F.2d 403, 406-08 (9th Cir.1988) (prejudice found where two jurors heard a sheriff's out-of-court statement that defendant had "done something like this before"); *Stockton v. Commonwealth of Virginia*, 852 F.2d 740, 743-746 (4th Cir.1988) (prejudice found where the owner of a diner where jurors were dining said to jurors, "I hope you fry the son-of-a- bitch"), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989); *cf. United States v. Endicott*, 869 F.2d 452, 454, 457 (9th Cir.1989) (no prejudice where juror makes improper comments to witness).

Here, it is likely that Bennie Warren's statement had a substantial and injurious influence in determining the jury's verdict. His advice to three jurors that they "hang" Dyer is extremely inflammatory and prejudicial on two levels: he urged the jury to decide, based on his own sense of outrage, that Dyer should hang; and he may have left the impression with the jury, contrary to fact, that all crime victims and their families want revenge. *See, e.g.*, "Group of Murder Victims' Families Opposes Execution," *San Francisco Chron.*, Sept. 30, 1995, at A15.

This face-to-face admonition from a survivor of Dyer's violence may well have had a decisive impact upon a wavering juror. As in *Maree*, Warren presented "strong opinions" in an "aggressive manner" on the "proper outcome of [Dyer's] case." 934 F.2d at 202. As in *Lawson*, the out-of-court statement " 'was both directly related to a material issue in the case and highly inflammatory.'" 60 F.3d at 613 (quoting *Dickson v. Sullivan*, 849 F.2d 403, 407 (1988)). As the Fourth Circuit held in Stockton, the jurors "were exposed to the type of pointed and prejudicial suggestion whose utterance encourages the all too human tendency to pursue the popular course." 852 F.2d at 746.

B. EX PARTE CONTACT WITH THE JUDGE

Jury foreman Bartholomew also testified that while he and other jurors were at a restaurant, they ran into the trial judge. According to Bartholomew, "He commended us for work well done, and he brought a fellow with us to explain that he can't speak to us singularly or alone and that he was the 13th juror, in essence, and he had to go and review and that's why he couldn't really socialize.... I think he made reference to he could change [the verdict] if he thought we were in error." (emphasis added) Bartholomew Declaration at 5-6. The encounter occurred after the verdict of guilt and before or during the penalty phase.[16]

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16. When asked when this encounter occurred, Bartholomew testified: "I'm not real sure. It was sometime towards the end of the trial." Bartholomew Declaration at 6. He had previously signed a declaration stating that the encounter with the judge occurred between the guilty and penalty phases of the trial. *Id.*

Alfonsa L. Carney, another juror who remembered this encounter, testified as follows:

> CARNEY:And as I remember it, the contact we had with the judge was after we had served as jurors. I don't know whether it was during the phase--I think it was after the verdict.
>
> QUESTION: After the guilt phase?
>
> CARNEY: Yes, I think so. I'm not sure of that, but I'm positive we had no contact with him when we sat as jurors.
>
> QUESTION: But it may have been between the guilt and penalty phases?
>
> CARNEY: Yes.

Statements "that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision" are constitutionally impermissible. *Romano v. Oklahoma*, 512 U.S. 1, 8-10, 114 S.Ct. 2004, 2010, 129 L.Ed.2d 1 (1994) (quoting *Darden v. Wainwright*, 477 U.S. 168, 184 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144 (1986)). *See Caldwell v. Mississippi*, 472 U.S. 320, 342, 105 S.Ct. 2633, 2646, 86 L.Ed.2d 231 (1985) (O'Connor, J., concurring in part and concurring in the judgment) (the Constitution forbids "inaccurate and misleading information that minimizes the importance of the jury's deliberations in a capital sentencing case").

The trial judge's ex parte communication that he was the "13th juror" and that he could reverse the jury's verdict does not accurately reflect California law. After every sentence of death returned by a California jury, the trial judge undertakes an automatic review of the verdict. Cal.Penal Code § 190.4(e). During this review, the judge "must independently reweigh the evidence of aggravating and mitigating circumstances and then determine whether, in the court's independent judgment, the weight of the evidence supports the jury verdict." *People v. Edwards*, 54 Cal.3d 787, 1 Cal.Rptr.2d 696, 707, 819 P.2d 436, 447 (1991), cert. denied, 506 U.S. 841, 113 S.Ct. 125, 121 L.Ed.2d 80 (1992). However, there is no such review

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Deposition of Alfonsa L. Carey, August 19, 1993, at 9. Carney apparently confused the end of the guilt phase with the end of the trial. In any event, she repeatedly agreed that the encounter could have occurred during the penalty phase of Dyer's trial.

The fact that the trial judge so scrupulously avoided ex parte contact with the jurors indicates that the trial was still in progress. The fact that he commended the jurors for work well done indicates only that the guilt phase was over.

where the jury spares the life of a capital defendant. Moreover, the judge's function during this review "is not to make an independent and de novo penalty determination...." *People v. Mickey*, 54 Cal.3d 612, 286 Cal.Rptr. 801, 852, 818 P.2d 84, 135 (1991) (citation and quotation omitted), *cert. denied*, 506 U.S. 819, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992). Indeed, courts have repeatedly upheld pro forma reviews under § 190.4(e). *See, e.g., People v. Allison*, 48 Cal.3d 879, 258 Cal.Rptr. 208, 222, 771 P.2d 1294, 1318 (1989) (because the propriety of the sentence of death was "self-evident from the record," defendant "was not prejudiced by the trial judge's failure to adequately state his reasons" for upholding the verdict), *cert. denied*, 494 U.S. 1090, 110 S.Ct. 1835, 108 L.Ed.2d 964 (1990); *Odle v. Calderon*, 884 F.Supp. 1404, 1431 (N.D.Cal.1995) (affirming because the trial judge "made findings in the record, albeit cursorily").

The relationship under California law between the jury and the judge during the sentencing phase of a capital trial is complex; the statement that the judge is the "13th juror" and could change an erroneous verdict is a misleading simplification. Under § 190.4(e), the trial judge may not review a sentence of life imprisonment, may not make "an independent and de novo penalty determination," and may uphold a sentence of death with cursory findings. Contrary to law, a reasonable juror, relying on the words of the trial judge, could have believed that the sentencing verdict was purely advisory and that the judge bore the ultimate burden of deciding Dyer's fate. The judge's comments thus "misle[ ]d the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should [have] for the sentencing decision." *Romano*, 512 U.S. at 9, 114 S.Ct. at 2010 (citation and quotation omitted).[17]

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17. The majority argues that "the judge was simply attempting to

In *Driscoll v. Delo*, 71 F.3d 701 (8th Cir.1995), *cert. denied*, --- U.S. ----, 117 S.Ct. 273, 136 L.Ed.2d 196 (1996), decided a year after *Romano*, the Eighth Circuit reached the same conclusion. There, the prosecutor told the jury during the sentencing phase of a capital trial that the judge was the "thirteenth juror" and could overrule the jury's verdict. *Id.* at 711. The court noted the "technical accuracy" of these statements--Missouri law allows judges to reduce an "excessive" punishment--but nonetheless granted the writ. *Id.* at 713. The court reasoned, in part, that "[t]he judge could not have sentenced [the defendant] to death absent the jury's recommendation to do so," *id.*; the same is true under California law. As in *Driscoll*, the judge in the instant case essentially told the jury that it could defer the extremely difficult decision of whether or not [Dyer] should be sentenced to death. As a consequence, the jury made the decision that [Dyer] would be killed without full recognition of the importance and finality of doing so and, therefore, without affording the decision the full consideration it required.

Id.

Because of the unacceptably high risk that the judge's ex parte comments misled the jury as to its role at sentencing and thus led the jury to feel less responsibility than it should have for Dyer's fate, there was a substantial and injurious effect on the jury's deliberations, *Brecht*, 507 U.S. at 623, 113 S.Ct. at 1713-14.[18]

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avoid any prolonged contact without appearing rude." Majority Opinion at 740. Be that as it may, it is his words that count. What they convey to the jury must be our focus.

18. The majority argues that the jury instruction corrected any prejudice caused by the judge's ex parte statement. Majority Opinion at 740-41. These were the instructions: "I have not intended by anything I have said or done or by any questions that I may have

V. CONCLUSION

It is not often that so many grave defects taint one trial. A dishonest juror failed on voir dire to disclose under questioning the repeated and awful violent crimes committed against her family and herself, and by family members, and, particularly, failed to disclose the circumstances of the killing of her brother, Richard. She was biased in fact and also should have been presumed biased as a matter of law. Defense counsel was too busy with other cases to understand the significance of his client's use of PCP hours before the crimes for which he stood trial, and to prepare and present a defense based upon an inability to form the actual intent to kill with the help of experts adequately informed by him and with the presentation of eye-witnesses to the PCP use by his client. His performance fell below an objective standard of reasonableness and prejudiced the defense. The admitted *Beeman* error was not harmless. Jury deliberations at the penalty phase were tainted by the inflammatory ex parte statements of a witness-victim and the misleading and entirely improper ex parte remarks of the trial judge to certain jurors. Any one of the defects entitled Dyer to redress. Cumulatively they compel redress.

Dyer has been sentenced to death without a fair trial. He is entitled to a new trial. Accordingly, I dissent.

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asked to intimate or suggest what you should find to be the facts on the questions submitted to you...." However, this instruction merely reminded the jury that it had to determine the facts for itself without second-guessing the judge. It did not address the power of the judge to reverse the sentence returned by the jury, or in any other way inform the jury that responsibility for deciding whether to execute Dyer rested on its shoulders.

FILED SEPTEMBER 23, 1992
RICHARD W. WIEKING, CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

ALFRED DYER,
Petitioner,

v.

DANIEL VASQUEZ, et al.,
Respondents.

No. 89-3454-VRW

ORDER

This is a petition for writ of habeas corpus filed by Alfred R. Dyer, a prisoner in state custody under sentence of death. Petitioner's judgment and sentence were affirmed by the California Supreme Court on April 28, 1988. People v. Dyer, 45 Cal.3d 26, 37-44, cert. denied, 488 U.S. 934 (1988). On May 4, 1989, petitioner's first state habeas petition was denied by the California Supreme Court without comment or citation.

Proceedings in this court began on September 20, 1989 when petitioner filed a petition and applied for, and received, a stay of execution and appointment of counsel. After the answer and traverse were filed, respondent moved, on June 15, 1990, for summary judgment or in the alternative for partial summary adjudication. Respondent's motion was originally set for hearing on August 14, 1990 but, for a number of reasons, was not heard until February 6, 1991.

After the hearing and before any decision issued on respondent's summary judgment motion, the court granted, on March 26, 1991, petitioner's motion for funds to investigate additional allegations of juror bias. On May 9, 1991, petitioner asserted new allegations of juror bias in a supplemented petition. On July 9, 1991, petitioner filed for additional funds to investigate new evidence regarding petitioner's diminished capacity defence. On July 23, 1991, the court denied the request for investigative funds, found that petitioner's new allegations of juror misconduct fundamentally altered the claim presented to the state courts and ordered petitioner to return to state court to exhaust the new allegations concerning diminished capacity and juror misconduct as well as aspects of Claims 1, 5, 7, 21 and 32 which either were not previously presented or not fairly presented to the California Supreme Court. Petitioner was also ordered to exhaust "any aspect of any claim, whether asserted in the federal petition or not, which petitioner knows or should know to be unexhausted." See Order of July 23, 1991, pp. 4-5. Petitioner's motion for reconsideration was denied on August 26, 1991.

Petitioner filed a petition and an amended petition with the California Supreme Court on August 15, 1991 and August 31, 1991, respectively. That court treated the two filings as separate petitions and denied both in orders

of October 16, 1991 and October 31, 1991. The two orders were identically worded: Petition for writ of habeas corpus DENIED. All claims were previously raised by petitioner and considered by this court in the course of ruling on his automatic appeal and subsequent habeas corpus petition filed on January 12, 1989. The new facts alleged to support these claims are insufficient to set forth a prima facie case for relief.

Petitioner returned to this court for a status conference in December of 1991. The parties filed supplemental briefs and, on February 6, 1992, the court conducted a second hearing on respondent's summary judgment motion.[1]

On May 4, 1992, the Supreme Court decided Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992). Two days after that decision, this court ordered additional briefing from the parties and conducted a hearing on June 15, 1992 to determine the impact of that decision on this case.

I.

Petitioner argues that summary judgment is premature at this time because his assertions of error require a review of the entire record to determine whether their effect is harmless or whether relief is in order. Petitioner's Separate Summary Memorandum in Opposition to Summary Judgment, pp.2, 4. Petitioner's position is that until petitioner is permitted the opportunity to engage in discovery, the "entire record" is not complete and therefore any determination of harmless

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1. Petitioner also moved for interim fees and additional investigative funds; the court will address these matters at a later date. This order is limited to respondent's summary judgment motion.

error before such time would be inappropriate. Ibid. The court does not agree.

This court has no doubt that at this time it may decide as a matter of law that petitioner is not entitled to relief on certain of his claims. Absent a showing of cause, petitioner has no right to discovery in collateral proceedings. See Habeas Rule 6. If petitioner has set forth facts establishing cause for discovery, this court will deny summary adjudication and give petitioner the opportunity to prove his claim after discovery and/or at an evidentiary hearing. It makes no sense to delay adjudication of claims based on some vague theoretical possibility that facts not even alleged -- much less shown -- will make not harmless certain claims of error otherwise without substance.

Accordingly, as no party contends that any claim before the court is unexhausted, this court will review each of petitioner's claims and determine, after reviewing the evidence in a light most favorable to petitioner, whether there are any issues of genuine material fact or if respondent is entitled to judgment as a matter of law. Jeffries v. Blodgett, 771 F.Supp. 1520, 1534 (W.D.Wash. 1991). See also McKenzie v. Risley, 915 F.2d 1396, 1398 (9th Cir. 1990) and Fed.R.Civ.P. 56, applicable to habeas proceedings pursuant to Rule 11, Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules").

II.

The court begins with the axiom that "the federal judiciary must * * * take particular care in death penalty cases to give patient and thoughtful review of claims presented by petitioners through their appointed counsel." Mercer v. Armontrout, 864 F.2d 1429, 1433

(8th Cir. 1988). The court notes, however, that federal habeas corpus review is severely circumscribed. Once affirmed on appeal, a "presumption of finality and legality attaches to the conviction and sentence." Barefoot v. Estelle, 463 U.S. 880, 887 (1983). Federal constitutional violations are the only proper subjects of federal habeas corpus inquiry. Milton v. Wainwright, 407 U.S. 371, 377 (1972); Estelle v. McGuire, 112 S.Ct. 475, 480 (1991).

CLAIM 1

Petitioner claims that his Sixth Amendment right to an impartial jury was violated by the misconduct of juror Jez F ("Juror F"). Petitioner alleges that Juror F committed numerous instances of juror misconduct, including answering four questions falsely at voir dire and responding falsely to questions asked of her by the trial judge in camera.

Juror F answered no to the following four voir dire questions: had any of her family members been the victim of a crime; had any of her relatives been accused of any nontraffic offences; had she ever served as a juror on a criminal case before; and did she know the defendant? See RT 1163-64; RT 1546. Petitioner contends that Juror F's negative response to each of these questions was false. Petitioner also alleges that when the trial judge conducted an in camera hearing regarding the veracity of Juror F's response to the first of the four challenged voir dire auestions -- whether any of her relatives had been the victim of a crime -- Juror F's answers to the judge were also false.

"The Sixth Amendment right to a jury trial 'guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors.'" Tinsley v. Borg,

895 F.2d 520, 523 (9th Cir.) cert. denied 111 S.Ct. 974 (1991), quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961). See also Duncan v. Louisiana, 391 U.S. 145 (1968); Turner v. Louisiana, 379 U.S. 466, 472 n.10 (1965). Even where "'only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury.'" Tinsley v. Borg, 895 F.2d at 523-24, quoting United States v. Eubanks, 591 F.2d 513, 517 (9th Cir. 1979), quoting United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir) cert. denied 434 U.S. 818 (1977).

In McDonough Power Equipment Corp. v. Greenwood, 464 U.S. 548, 556 (1984), the Supreme Court enunciated the following standard to determine when a juror's voir dire answers constitute a denial of the constitutional right to an impartial jury:

> [A] party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.

The Ninth Circuit applies the McDonough standard on collateral review. Tinsley v. Borg, 895 F.2d at 524.

Petitioner's juror misconduct claim is best understood chronologically, first as it was raised to the trial court and subsequently as it was developed thereafter.

a. Claim as originally raised at trial

Contrary to Juror F's answer on voir dire that none of her family members had ever been the victim of a crime, petitioner's counsel informed the trial court at

the conclusion of the guilt phase that Juror F's brother Richard had been shot ,to death five years previously. RT 2693. Counsel explained he had just obtained this information from his client who was informed of it in jail by Juror F's estranged husband, Melvin P. Ibid. The trial court scheduled an in camera hearing on the matter for the following day.

At the in camera hearing, counsel informed the court that he had interviewed Melvin P at jail the night before and Melvin had confirmed the violent nature of Richard F's death. RT 2705. The court asked the deputy district attorney, Mr. Curtis, if he had any information concerning Richard F's death. RT 2705. Curtis remembered the case against Richard F's assailant because he had prosecuted the case himself. RT 2706. Curtis also remembered that Richard F's assailant had pled guilty to manslauqhter. Ibid. Curtis, however, denied knowing whether Richard F was related to Juror F, but volunteered to "find out." Ibid. After recess, Curtis produced the file which documented that Willie Earl Shepard had been criminally prosecuted for killing Juror F's brother, Richard. Counsel later moved for mistrial asserting that the deputy district attorney knew or should have known of the falsity of Juror F's voir dire response because he had prosecuted Richard F's assailant. RT 2715. Curtis denied having made any connection between Richard F and Juror F until the morning of the in camera hearing. Ibid. The court denied counsel's motion for a mistrial based on prosecutorial misconduct. Ibid.

The court questioned Juror F in camera. RT 2708-2711. Juror F explained that because the shooting was an accident, she had not believed her brother was the victim of a crime. RT 2709. She also denied any knowledge regarding whether any legal steps, criminal

or civil or otherwise, were ever taken. Ibid. Based on the evidence before it, the court found Juror F's answers credible and ruled that her negative response to the voir dire question whether any of her family members had ever been the victim of a crime was not false because the question posed was reasonably susceptible of her interpretation. RT 2714; RT 3018. Counsel's motion for a mistrial was denied. RT 2713-2714.

b. Claim as raised on anpeal

In his appellate briefs, petitioner expanded his juror misconduct claim to allege that two of Juror F's voir dire responses were false -- not only that none of her family members had ever been the victim of violent crime, but also that none of her family members had ever been accused of any crimes. AOB 96-102. Petitioner claimed that Juror F must have known that her answer to the question that none of her family members had ever been accused of a crime was false because her estranged husband, Melvin P, was incarcerated at the time of petitioner's trial. AOB 97. Petitioner notes that despite their separation, Juror F must have known she was still related to her husband because, on voir dire, she volunteered and responded to his surname. See RT 780, 783.

In a supplemental brief on direct appeal, petitioner alleged that Juror F's answers to the judge at the in camera hearing, denying any knowledge about her brother's assailant, were also false. See ASB, 43-46. Juror F had been a plaintiff in a wrongful death suit and, as such, "must have known" that legal steps, "criminal or civil or otherwise," were taken against her

brother's assailant despite her denial of such knowledge to the trial judge.[2] Cf. ASB 44 and RT 2709.

Petitioner argued on appeal that Juror F's false answers demonstrated that he had been deprived of his constitutional right to an impartial jury and that the trial court had abused its discretion when it refused to grant a mistrial based on juror misconduct. AOB 98. The California Supreme Court rejected petitioner's claim and ruled that the trial court had not abused its discretion when it denied petitioner's motion for a mistrial based on Juror F's alleged misconduct. Dver, 45 Cal.3d at 59. The court noted that petitioner's new evidence of Juror F's bias existed at the time of trial and could have been presented to the trial court. Ibid.

c. Claim as raised in first state habeas petition

In his first state habeas petition, petitioner again raised the juror misconduct claim, this time including the allegation that Juror F's negative answer to the voir dire question whether she had ever sat on a criminal jury was false. CT 356; RT 1546; SHP 11; SHP Ex.9. Juror F had served as a juror in a drunk driving case. Ibid.

In his habeas reply brief, petitioner again expanded his juror misconduct claim, raising two new allegations and asserting additional facts in support of his earlier

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2. Petitioner submits a declaration which suggests that Juror F's brother, Richard, had known his assailant for years and had frequently had hostile encounters with him; that Richard's assailant was eventually convicted of voluntary manslaughter; and that Juror F must have known these facts because she was a named plaintiff in a wrongful death suit against her brother's assailant. RJN Exs. A - C; SHP Ex. 23.

allegations. Petitioner raised the new allegation that Juror F had falsely answered no to the voir dire question whether she knew the petitioner. RT 1164. Petitioner alleges Juror F must have known of petitioner because her estranged husband, Melvin P, had attended school with petitioner and her revelation to him that she was on petitioner's jury "evidences" that she at least knew that he and petitioner were acquaintances. SHRB, p.5, n.3, SHP Ex. 12, 16.

In addition, petitioner alleged another incident of juror misconduct: that Juror F's discussions with her estranged husband violated the court's admonition not to discuss the case with anyone. SHP, p.5, n.4; RT 785.

Petitioner also alleged additional facts in support of his claim that Juror F falsely answered no to the voir dire question that none of her family members had ever been accused of a crime. Petitioner claimed her answer was false not only because her estranged husband was then in jail on charges of rape, sodomy and kidnapping, but also because her brother Billy, who had one prior drug conviction had recently been arrested on another drug charge, and her uncle, who had once been arrested and accused of killing a woman, had been convicted of armed robbery. Id. at 7; RT 1546; SHP Ex. 18, 23.[3]

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3. In a recently submitted declaration, counsel for petitioner state that they have recently contacted Juror F and she confirmed her knowledge of the criminal records of "numerous relatives." See Declaration of Anne G. Bookin In Further Opposition to Respondents' Motion For Summ. Jdgmt, ¶ 5. Counsel's declaration, however, fails to inform court whether Juror F knew of her relatives' criminal record at the time of her voir dire testimony.

The California Supreme Court rejected petitioner's expanded juror misconduct claim when it denied petitioner's first state habeas petition without comment or citation on May 4, 1989.

d. Federal proceedings and order to exhaust

Petitioner filed his federal petition on September 20, 1989. During the course of federal proceedings, petitioner asserted new allegations in support of his juror misconduct claim.

In his May 9, 1991 Supplement to Petition, petitioner submitted additional allegations in support of his claim that Juror F falsely answered no to the question whether she knew the petitioner. Petitioner alleged that Juror F's sister Charlesetta "possibly" knew "suck" and Joyce Murray, sisters of Floyd Murray, one of petitioner's murder victims, and Belinda Murray, Floyd's sister who was injured at the murder scene but survived to testify against petitioner. Juror F's sister Charlesetta attended junior high school with Cuck and Joyce Murray who reportedly ran in the same social circles as Charlesetta. Charlesetta is but one year younger than Juror F. Supplement to Petition, p.2. Although poorly stated, these allegations suggested that Juror F "possibly" herself knew, or knew that her sister knew, family members of petitioner's victims and thus, contrary to her answer on voir dire, knew of defendant.[4]

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4. The court notes, however, that petitioner's allegations stop short of alleging that Juror F actually knew the sisters of petitioner's victims or knew that her sister knew the sisters of petitioner's victims. Instead, petitioner asserts "possible" knowledge. Yet, even were petitioner to allege actual knowledge, petitioner has failed to allege any nexus between knowledge of the sisters of petitioner's victims and

Respondent contended that these new allegations were unexhausted as were the allegations of juror misconduct which petitioner raised for the first time in his state habeas reply brief. This court agreed that the allegations raised for the first time in petitioner's state habeas reply brief were not fairly presented to the state courts and, that those allegations, in addition to the allegations in petitioner's supplemental petition, fundamentally altered the nature of petitioner's juror misconduct claim and therefore exhaustion was required. See Orders of July 23, 1991 and August 26, 1991.

e. Second state habeas petition

Petitioner returned to state court and filed a second state habeas petition and an amended petition with the California Supreme Court on August 15, 1991 and August 31, 1991.[5] That court treated the two filings as separate
petitions and denied both in orders of October 16, 1991 and October 31, 1991. The two orders were identically worded:

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knowledge of defendant. Absent any such nexus, these allegations fail to demonstrate the falsity of Juror F's negative answer to the question whether she knew defendant.

5. Petitioner was ordered to exhaust other claims as well. Petitioner was ordered to exhaust new allegations concerning his diminished capacity and juror misconduct claims as well as aspects of Claims 1, 5, 7, 21 and 32 which either were not previously presented or not fairly presented to the California Supreme Court. In addition, petitioner was ordered to exhaust "any aspect of any claim, whether asserted in the federal petition or not, which petitioner knows or should know to be unexhausted." See Order of July 23, 1991, pp. 4-5. Petitioner's motion for reconsideration was denied on August 26, 1991.

Petition for writ of habeas corpus DENIED. All claims were previously raised by petitioner and considered by this court in the course of ruling on his automatic appeal and subsequent habeas corpus petition filed on January 12, 1989. The new facts alleged to support these claims are insufficient to set forth a prima facie case for relief.

f. Return to federal court

Petitioner returned to federal court and argued at the court's oral hearing of February 6, 1992, as he had argued in his papers before, that because the material facts pertaining to Juror F's bias were not adequately developed at the state court hearing, he was entitled to a federal hearing to establish juror misconduct under Townsend v. Sain, 372 U.S. 293 (1963).

While this summary judgment motion was under submission, the Supreme Court, on May 4, 1992, decided Keenev v. Tamayo-Reyes, 112 S.Ct. at 1715. Because Tamayo- effected a petitioner's right to a federal hearing under Townsend, this court ordered additional briefing from the parties and conducted a hearing on June 15, 1992 to determine the impact of that decision on: one, petitioner's entitlement to a federal evidentiary hearing; and two, the statutory presumption of correctness.

In Townsend, the Court held that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances, if:

(l) the merits of the factual dispute were not resolved in the state hearing;

(2) the state factual determination is not fairly supported by the record as a whole;

(3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;

(4) there is a substantial allegation of newly discovered evidence;

(5) the material facts were not adequately developed at the state-court hearing; or

(6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearinq.

372 U.S. at 313. For the sake of brevity, this holding can be referred to as the six circumstances under Townsend when a federal hearing is mandatory.

Under Townsend's fifth circumstance, a hearing is "compelled," "if, for any reason not attributable to the inexcusable neglect of petitioner, * * * evidence crucial to the adequate development of the constitutional claim was not developed at the state hearing * * *." Id. at 317, citing Fay v. Noia, 372 U.S. 391, 438 (1963). A petitioner does not commit inexcusable neglect and forfeit his right to a federal hearing unless he "deliberately bypassed" his opportunity to develop the material facts in the state court hearing. Id. at 317. In Townsend, the Court decided that counsel's negligent failure to elicit the material facts at the state court hearing would not constitute inexcusable neglect or a deliberate bypass of state remedies. See also Streetman v. Lynaugh, 812 F.2d 950, 960 (5th Cir. 1987) ("counsel's failure to marshall crucial evidence underlying a federal

claim because of insufficient preparation or other neglect does not constitute a deliberate bypass"); and Guice v. Fortenberry, 661 F.2d 496, 507 (5th Cir. 1981) ("the defendants and their attorneys did not appreciate fully the relevance of the missing evidence; [s]uch neglect is not inexcusable within the meaning of Fay v. Noia").

In Tamayo-Reyes, the Supreme Court reconsidered Townsend's fifth circumstance and rejected the definition of inexcusable neglect as occurring only where the petitioner had deliberately bypassed state remedies. Absent a funuamental miscarriage of justice,[6] Tamayo-Reyes held that a federal hearing is mandatory under Townsend's fifth circumstance only if petitioner can establish "cause and prejudice" for his failure to develop the material facts at the state court hearing. 112 S.Ct. at 1721. Short of ineffective assistance of counsel, counsel's negligence does not constitute cause sufficient to excuse petitioner's failure to develop the material facts at the state court hearing. Id. at 1720, n.5.

Respondent argues that because petitioner negligently failed to develop the material facts which were discoverable at the time of the state court hearing, Tamayo-Reyes precludes any entitlement to a mandatory federal hearing and moreover, because petitioner was given a "full and fair opportunity" to

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6. 6 The Court defines the fundamental miscarriage of justice exception in reference to McCleskev v. Zant, 111 S.Ct. 1454 (1991) and Murray v. Carrier, 477 U.S. 478, 496 (1986), i.e., that a federal hearing is compelled despite the absence of cause and prejudice where petitioner has asserted a constitutional violation suggesting actual innocence. This exception does not apply here where petitioner's juror bias claim does not implicate actual innocence.

litigate his juror bias claim in state court, Tamayo-Reyes supports respondent's position regarding the impropriety of an evidentiary hearing.

Petitioner disagrees. He argues that (i) Tamayo-Reyes is inapposite; (ii) even if Tamayo-Reyes precludes a mandatory hearing under Townsend's fifth circumstance, a federal hearing is still compelled under Townsend's other five circumstances; and (iii) even were Tamayo-Reyes to apply to preclude a mandatory hearing under Townsend's fifth circumstance, this court nonetheless retains the discretionary authority to conduct a hearing.

(i) Applicability of Tamayo-Reyes

Petitioner argues that Tamayo-Reyes is inapposite because he "did not fail to develop the factual record in state court in any regard." Petitioner's Supplemental Memo, p-9.

The Court in Tamayo-Reyes noted that:

> Applying the cause-and-prejudice standard in cases like this will obviously contribute to the finality of convictions, for requiring a federal evidentiary hearing solely on the basis of a habeas petitioner's negligent failure to develop facts in state court proceedings dramatically increases the opportunities to relitigate a conviction.

112 S.Ct. at 1719 (emphasis added). Focusing on the word "proceedings," petitioner maintains that Tamayo-Reyes only applies when a petitioner has failed to develop the material facts in the state court proceedings as a whole, not just at the trial court level

or on direct appeal. Petitioner's Supplemental Memo, p. 10. Petitioner argues that because he ultimately explored and presented all allegations of his juror bias claim to the state courts, his failure to bring out all allegations at the in camera hearing conducted by the trial court does not preclude a federal hearing. Ibid.

The language of the Tamayo-Reyes opinion could be read - to support petitioner's argument that factual development of the claim can take place at any level of state court "proceedings." Sumner v. Mata, 449 U.S. 539 (1981), also could be read to support this interpretation.

In Sumner v. Mata, the Supreme Court ruled that a "hearing" for 2254(d)/statutory presumption of correctness purposes includes not just formal court hearings but also state appellate and collateral decisions on the merits even where no evidentiary "hearing" was held. 449 U.S. at 546. This definition of "hearing," however, would appear to be unworkable for Townsend/Tamayo-Reyes purposes. Were this the case, any claim for which the material facts were not fully developed at the state trial court hearing, could nonetheless receive a federal hearing so long as petitioner had eventually exhausted all allegations on appeal or on state collateral review. Such an interpretation would undermine the holding and rationale of Tamayo-Reyes since all claims based on fully exhausted factual allegations could receive a federal hearing despite petitioner's failure to develop the material facts at the hearing which was afforded by the state courts. This court therefore concludes that Tamayo-Reyes and Townsend's fifth circumstance are only relevant when the state courts have conducted a formal hearing. Here, the trial court conducted a formal hearinq so Tamayo-Reyes is applicable.

(ii) Townsend's other circumstances

Petitioner argues that even if Tamayo-Reyes precludes a mandatory hearing under Townsend's fifth circumstance, Tamayo-Reyes left unchanged the other circumstances under which federal hearings are compelled under Townsend. Petitioner insists he is entitled to an evidentiary hearing under those remaining circumstances.

Petitioner is correct that the Court's holding in Tamayo-Reyes is limited to Townsend's fifth circumstance. See 112 S.Ct. at 1717, 1720 n.5. Therefore, were petitioner ab'e to establish any of Townsend's other circumstances, a hearing would still be compelled. Therefore it is necessary to consider those other circumstances.

(a) Were the merits of the factual dispute resolved in the state court hearing?

Based on the evidence before it, the trial court determined that Juror F was not biased. RT 2714. Despite new allegations of Juror F's bias, the California Supreme Court rejected petitioner's claim on direct appeal. In his first state habeas petition, petitioner further expanded his juror misconduct claim and the state court rejected it, on its merits, without comment or citation. Finally, when ordered to exhaust his new allegations of juror misconduct, the California Supreme Court again rejected this claim, noting that the claim had previously been presented and the new facts alleged to support the claim were insufficient to set forth a prima facie case. Thus, all facets of this claim have been rejected by the state courts on their merits and petitioner is not entitled to an evidentiary hearing under Townsend's first circumstance.

(b) Was the state factual determination sucoorted bv the record as a whole?

Petitioner argues he is entitled to a hearing under Townsend's second circumstance because the state's factual determination of no bias is not supported by the record as a whole. The resolution of this issue depends upon how the terms "state factual determination" and "record as a whole" are defined.

If the "state factual determination" is limited to: he determination by the court which afforded the hearing and; he "record as a whole" is limited to the record created at that hearing, then in this case the trial court's factual letermination of no bias was, due to the limited evidence efore it, supported by the record.

However, if the "state factual determination" is efined to include the disposition of the claim by the state appellate and habeas courts and "record as a whole" is efined to include the expanded record which was presented direct appeal and on habeas, then it is more difficult to onclude that the state factual determination of no bias was supported by the "record as a whole." Were Townsend's second circumstance defined in this manner, petitioners not entitled to a mandatory hearing under Townsend's fifth circumstance, due to their failure to develop the material facts at the state court hearing, would nonetheless be entitled to a hearing under Townsend's second circumstance as long as they eventually presented their expanded allegations in later state proceedings. Such a holding could not be reconciled with Tamayo-Reyes because it would subvert its logic. Petitioner is not entitled to a mandatory hearing under Townsend's second circumstance.

(c) Were the fact-finding procedures employed by the state court adequate to afford a full and fair hearing?

The trial court did not in any way limit the fact-finding procedures. Therefore, it could not be said that the fact-finding procedures "employed by" the state court were nadequate for a full and fair hearing. Accordingly, no earing is compelled under Townsend's third circumstance.

(d) Is there a substantial allecation of newly discovered evidence?

Petitioner asserts new allegations of bias which ere not presented to the trial court. However, each and very one of these new allegations were available to etitioner at the time of the trial court's in camera earing. Hence, these allegations cannot be called "newly iscovered." Newly discovered evidence is limited to vidence which "could not reasonably have been presented to he state trier of facts." Townsend, 372 U.S. at 317. See lso U.S. Ex Rel. Shore v. O'Leary, 833 F.2d 663, 669 (7th in 1987); Ross v. Harper, 716 F.2d 1528, 1540 (llth Cir. 983). Petitioner is not entitled to a mandatory hearing nder Townsend's fourth circumstance.

(e) Does it appear that the state trier of fact did not, for any reason, afford the habeas applicant a full and fair fact hearing?

The trial court did not limit the scope of the earing in any way. Therefore, it cannot be said that the rier of fact did not afford petitioner a full and fair earing. Accordingly, a federal hearing is not compelled under Townsend's sixth circumstance.

(iii) Discretionary authority to conduct hearina

Petitioner argues that the court retains the iscretionary authority to order a hearing even where no mandatory hearing is required. Petitioner is correct on this proposition.

"The purpose of the [six part Townsend] test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge." Townsend v. Sain, 372 U.S. at 318. See also 112 S.Ct. at 1727 (O'Connor, J., dissenting) ("the district courts still possess the discretion, which has not been removed by today's opinion, to hold hearings even where they are not mandatory"); and Singletary v. Blanco, 943 F.2d 1477 (llth Cir.), cert. denied 112 S.Ct. 2290 (1992).

Were 28 U.S.C. Section 2254(d)'s presumption of correctness to apply to the state court's finding of no bias, this court might refuse to grant a discretionary hearing and instead accord the state court's findings of fact a presumption of correctness.

Petitioner and respondent agree that Tamayo-Reyes does not change the way the presumption of correctness applies to petitioner's claims in these proceedings. However, the parties continue to disagree over when the presumption of correctness applies. Respondent maintains that the statutory presumption of correctness applies to every factual finding of a state court. Petitioner disagrees. Petitioner argues that the statutory presumption only applies if a federal evidentiary hearing is held and then only to determine the burden of proof at the hearing. Petitioner is wrong on this point.

The statutory presumption of correctness does not come into play only when a federal evidentiary hearing is held. See Sumner v. Mata, 449 U.S. at 547. Factual findings made by state trial and appellate courts, whether made after hearing or on the basis of the written record, are entitled to the presumption of correctness unless one of the eight statutory exceptions applies. Ibid. These matters are unaffected by Tamayo-Reyes.

The parties, however, failed to grasp, the dilemma the court must face in applying the statutory presumption of correctness after the Tamayo-Reyes decision. As Justice O'Connor pointed out in her dissent, a petitioner who has failed to develop the material facts below may be exempt from the statutory presumption of correctness under 2254(d)(3) and yet, under the new standard announced in Tamayo-Reyes, not be entitled to a mandatory hearing in order to prove his claim. 112 S.Ct. at 1727 (O'Connor, J. dissenting), ("there will likely be instances where a petitioner will be entitled to an exception from the statutory presumption of correctness but will not be entitled to a hearing"). That is the case here.

As the Tamayo-Reyes majority notes, whether petitioner is entitled to an evidentiary hearing and whether the statutory presumption of correctness applies, are "distinct" issues. 112 S.Ct. at 1720 n.5. Therefore, even if this court concludes that petitioner is not entitled to a mandatory evidentiary hearing under Townsend, the court must still decide whether the state court findings are subject to a presumption of correctness under Section 2254 (d).[7] "[S]tate court

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7. 28 U.S.C. § 2254(d), in relevant part, states:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court * * * evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed correct unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit - -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adeguate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced * * * and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, * * * the burden shall rest upon the applicant to establish by

findings of fact 'shall be presumed to be correct' in a federal habeas corpus proceeding unless one of [Section 2254(d)'s] eight enumerated exceptions applies." Miller v. Fenton, 474 U.S. 104, 105 (1985).

Section 2254(d)(3) exempts petitioner from the statutory presumption of correctness if the material facts were not adequately developed at the state court hearing. Unlike Townsend and Tamayo-Reyes, Section 2254(d)(3)'s exception does not have any caveat for inexcusable neglect. Rather, if the material facts were not adequately developed below, apparently for whatever reason, petitioner may be exempt from the statutory presumption of correctness.

Section 2254(d)(8) provides that the statutory presumption of correctness will not apply in federal court when the part of the record from which such determination was made by the state court is not fairly supported by that part of the record as a whole. Whether petitioner qualifies for the 2254(d)(8) exception depends upon whether this court focuses on the factual determination made by the trial court or the rejection of the claim on its merits by the state's appellate and habeas courts.

The trial court's determination of no bias would not fall within the terms of this exception since the part of the record from which it made its determination -- due to the limited evidence before it -- supports the determination of no bias. In other words, the trial court's determination of no bias would be subject to the statutory presumption of correctness.

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convincing evidence that the factual determination by the State court was erroneous.

Factual findings made by state trial and appellate courts, whether made after hearing or on the basis of the written record, are entitled to the presumption of correctness unless one of the eight statutory exceptions applies. See Sumner v. Mata, 449 U.S. at 539. On direct and collateral review, the California Supreme Court summarily denied petitioner's juror bias claim on its merits. When a court rejects a juror bias claim on its merits, it would appear safe to reason that implicitly the court made a factual finding of no bias. If California's rejection of the claim on direct appeal and on state habeas is not supported by the record as a whole, petitioner may be exempt from the statutory presumption of correctness under Section 2254(d)(8).

Given that the state court's determination of no bias may not be subject to the statutory presumption of correctness under Section 2254(d)(3) or Section 2254(d)(8), and yet at the same time, that petitioner is not entitled to a mandatory hearing under Tamayo-Reyes to prove his juror misconduct claim, it is unclear how this court is to decide petitioner's juror misconduct claim. Due to the considerable number of serious allegations of juror bias, however, this court, out of an abundance of due process, will conduct a discretionary hearing. See Tamayo-Reyes, 112 S.Ct. at 1727 (O'Connor, J., dissenting). See also Hendricks v. Vasquez, 92 C.D.O.S. 7505 (9th Cir. September 2, 1992).

CLAIMS 2 - 7

In Claims 2 through 7; petitioner asserts ineffective assistance of trial counsel. In order to establish constitutionally ineffective representation, petitioner

must prove both incompetence and prejudice. Strickland v. Washinaton, 466 U.S. 668, 688 (1984).

There is a strong presumption that counsel's performance falls within the "wide range of professional assistance." Id. at 689. Petitioner bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. Id. at 688-89. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. Id. at 689. Because ineffective assistance claims are so easily manufactured and the evidence lies solely in the hands of interested parties, such claims are prone to abuse.

In order to establish that he was prejudiced by his attorney's ineffectiveness, petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. In determining the existence of prejudice, the court "must consider the totality of the evidence before the judge or jury." Ibid.

In Claim 2, petitioner alleges that trial counsel unreasonably failed to investigate facts relating to (a) an alleged head injury suffered by petitioner approximately six weeks prior to the crime and (b) the alleged unknowing consumption of the drug phencyclidine ("PCP") by petitioner on the night of the crime. Petitioner claims that had counsel investigated and presented this evidence, there is a reasonable probability of a different result at guilt and/or at penalty since both of these areas of fact were central to his sole line of defense at trial, diminished capacity, and also

would have provided substantial mitigating evidence at penalty.

In Claim 3, petitioner alleges that trial counsel failed to inform expert witnesses of all relevant facts. The relevant facts trial counsel assertedly failed to convey to the experts in Claim 3 are the same facts counsel assertedly failed to learn through investigation in Claim 2. Specifically, counsel never informed Dr. Yago, petitioner's only expert witness on the issue of diminished capacity, that petitioner had recently suffered head injuries or that petitioner had smoked PCP on the night of the shootings. Petitioner claims that this omission by his trial counsel deprived him of an effective diminished capacity defense at trial and of significant mitigating evidence at penalty.

Respondent argues that summary judgment is proper on Claims 2 and 3 for four reasons. One, respondent insists, without any citation to the state record,[8] that state court factual findings resolve the issues raised in Claims 2 and 3. Memo. In support of Motion for Summ. Jdgmt., pp. 6-7. Although respondent is correct that a federal court must ordinarily defer to a state court's findings of fact, federal courts will not defer to a state court's conclusion of law regarding that claim. "It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas." Townsend v. Sain, 372 U.S. at 318. See also Reiger v. Christensen, 789 F.2d 1425, 1428 (9th Cir. 1986). Therefore, any legal conclusion- by the state courts regarding ineffective assistance of counsel is not binding on this court. Ibid.

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8. Respondent instead cites to its own brief in support of its Answer where there are likewise no citations to the record.

To the contrary, this court must review questions of law de novo. Ibid. Presumably, respondent means that once state court factual findings are presumed correct, this court can resolve petitioner's claims as a matter of law. However, respondent fails to inform the court of any state court factual findings regarding what actions counsel did or did not undertake concerning petitioner's head injury or PCP use. Other than findings concerning counsel's failure to object to prosecutorial argument and failure to investigate and present the testimony of witnesses Fluker and Tioxiera, Dyer, 45 Cal.3d at 52-54, 67-68, this court is not aware of any state court factual findings concerning counsel's effectiveness.

Secondly, respondent claims that summary judgment is proper on Claims 2 and 3 because respondent has been prejudiced by petitioner's delay in raising these claims as medical records concerning these allegations are reportedly no longer available. Respondent insists that dismissal of petitioner's claim of ineffective assistance based on the head injury and PCP allegations is therefore required under Rule 9(a) of the Rules Governing Habeas Corpus Cases ("Habeas Rules").

Rule 9(a) states that a petition may be dismissed if the state is prejudiced by an unexcused delay in its filing. The prejudice may not be assumed but must be demonstrated by the state. Harris v. Pulley, 885 F.2d 1354, 1366 (9th Cir. 1988) (en bane). Prejudice has been found in cases when documents or records have been lost or destroyed or when witnesses or other necessary participants are unavailable. See, e.g., Brown v. Maggio, 730 F.2d 293, 295 (5th Cir. 1984); Bouchillon v. Estelle, 628 F.2d 926, 928 (5th Cir. 1980). Respondent's prejudice argument, however, must fail.

Inherent in an assertion of ineffective assistance of counsel is the notion that the client must not be bound by the constitutionally deficient performance of his counsel. Yet that is precisely what respondent's argument seeks to do. Trial counsel's ineffectiveness, if any there be, cannot form the basis of the state's prejudicial delay claim. Trial counsel's delay and the resultant unavailability of the records prejudices both petitioner, by having diminished the total of exculpatory and mitigating evidence at trial, and respondent, by making it more difficult to respond to the instant allegations.

If respondent is contending that it is postconviction counsel's delay that caused the current unavailability of the records, respondent has failed to show that this contention is true. A bare assertion of fault is insufficient. McDonnell v. Estelle, 666 F.2d 246, 251 (5th Cir. 1982). Respondent must show that the records in question were available to post-conviction counsel and that counsel acted unreasonably in failing to obtain them. Ibid.

Respondent has failed to make any such showing but, of course is still free to do so if there is evidence to support such an assertion.

Thirdly, respondent cites Wade v. Vasquez, 752 F.Supp. 931 (C.D. Cal 1990) for the proposition that counsel is not ineffective for failing to introduce evidence of PCP use. In the Wade case, however, the court rejected the claim as there was no evidence of recent PCP use and counsel had decided, as a tactical matter, not to introduce such evidence. Here, petitioner alleges PCP use on the night of the crime and, assuming this allegation is true, the record fails to disclose why

counsel failed to investigate and failed to present such evidence.

Fourthly, respondent argues that summary Judgment on Claims 2 and 3 is appropriate because there are no material facts in dispute. This is incorrect. Factual questions exist as to what facts counsel was or should have been aware and what actions counsel took or did not take in this regard and the reasons therefore. Because these material facts bear on the issue of whether counsel's performance was deficient, and if so, whether petitioner was prejudiced thereby, they must be resolved by evidentiary hearing.

In Claim 4, petitioner alleges that counsel was ineffective because (a) counsel failed to "make himself sufficiently available" during trial to petitioner's family who would have informed counsel that Belinda Murray consumed alcohol just prior to testifying and that she admitted to petitioner's family that she had felt "pressured" to testify favorably for the prosecution, see SHP Ex. 8, and (b) counsel failed to ascertain, much less elicit on cross-examination, that Belinda Murray, a key prosecution witness, was on criminal probationary status at the time of her testimony.

As to the allegation that counsel failed to "make himself sufficiently available" to petitioner's family, respondent argues that trial counsel has no duty to make himself available to a defendant's family to receive reports on the extra-courtroom conduct of a prosecution witness and that in no event is such a claim cognizable on federal habeas. Respondent argues that an omission to do what there was no obligation to do cannot amount to constitutional ineffectiveness. This argument has merit. Neither party cites authority for the proposition that trial counsel has a duty to consult with

trial observers. Nor is there any allegation that counsel was ineffective for failing to observe any impairment of Belinda Murray's ability to testify.

The declaration of petitioner's sister adds nothing substantive because she "cannot remember" whether she was able to give counsel information about Belinda Murray. Again, petitioner asks this court to base a determination of ineffective assistance on surmise Judging counsel's actions from counsel's perspective at the time of the alleged error and in light of all the circumstances, this court finds, as a matter of law, that counsel was not ineffective for failing to "make himself available" to petitioner's family at the time of trial. See Strickland, 466 U.S. at 689. Accordingly, under Federal Rule of Civil Procedure 56(d), the court resolves this aspect of Claim 4 in favor of respondent.

Petitioner also claims counsel was ineffective because, despite the fact that he was provided with a copy of Belinda Murray's "rap sheet," he failed to notice or at least failed to apprise the trial court of the fact of Murray's probation. Petition, p.45. Petitioner claims that "[a]s a result, the trial court refused to permit [p]etitioner's [t]rial [c]ounsel to cross-examine Murray on the fundamental issue of bias." Ibid.

Respondent argues that petitioner suffered no prejudice since counsel did cross-examine, at an in camera hearing conducted by the trial court, Murray at length concerning the disposition of her criminal charges in an attempt to show that she was motivated to testify favorably to the prosecution. RT 1740-43. The trial court, after hearing, rejected this conclusion and prohibited cross-examination before the jury of Murray concerning favorable disposition of charges. RT 1744. Respondent argues that the additional fact of

misdemeanor probation would not have materially enhanced the effectiveness of the attempted impeachment and therefore, would not have changed the trial court's decision. After reviewing the transcript of the in camera hearing, this court agrees and finds that counsel adequately raised the question of Murray's bias to the trial court. See RT 1740-1743. Accordingly, counsel was not constitutionally ineffective for failing to apprise the court of the fact of Murray's probation and this aspect of Claim 4 is resolved in favor of respondent.

Claim 5 alleges that trial counsel was ineffective for failing to discover all of the facts regarding Juror F's bias and for failing to adequately press the issue before the trial court.

Respondent contends that summary judgment is appropriate on Claim 5 because this court must defer to the state court's factual findings regarding petitioner's ineffective assistance of counsel claims. Memo. In Support of Motion for Summ. Jdgmt, p.p. 6-7. But, as this court noted earlier, other than findings concerning counsel's failure to object to prosecutorial argument and failure to investigate and present the testimony of witnesses Fluker and Tiexiera, this court is not aware of any state factual findings regarding ineffective assistance of counsel.

The facts underlying this claim -- that counsel was ineffective for failing to adequately investigate and present evidence concerning Juror F's bias and that petitioner was prejudiced thereby -- are considerably interwoven with the facts underlying petitioner's juror bias claim. The court would normally defer decision on this claim pending determination of the juror bias claim. However, at oral argument on June 15, 1992, petitioner's current counsel conceded that trial counsel's

failure to discover these facts at the time of the in camera hearing was not ineffective assistance of counsel. Petitioner has, therefore, abandoned Claim S of the petition.

In Claim 6, petitioner alleges that trial counsel was ineffective for failing to investigate evidence of petitioner's religious values and their connection to the circumstances of petitioner's surrender to the police. Petitioner alleges that contrary to the prosecutor's "theme" that petitioner had no sense of morality and was utterly without remorse, petitioner attended the Catholic Church and from the age of 12 or 13 would go to confession whenever he felt he had done something wrong. Petitioner alleges he went to a pastor within a few months of the shootings and arranged to surrender shortly thereafter. Petitioner contends that had this evidence been presented at penalty, a reasonable probability exists that petitioner would have received a penalty less than death.

Respondent disputes the connection between petitioner's discussion with the pastor and his surrender to the police, contending there was considerable delay between the two events. Respondent also disputes the mitigating value of the evidence concerning petitioner's religious background. Memo. in Support of Summ. Jdgmt, p. 39.

"Given the weakness of such testimony when juxtaposed with the overwhelming evidence of guilt, the horrifying nature of the crimes, and the abundant impeachment material available to the State," Russell v. Lynaugh, 892 F.2d 1205, 1213 (5th Cir.) cert. denied 111 S.Ct. 2909 (1991), this court is unable to conclude that a reasonable probability exists of a different judgment had counsel presented this evidence to the jury. Accordingly,

as a matter of law, this court finds that counsel was not ineffective for failing to present evidence of petitioner' religious values to the sentencing jury. Claim 6 is resolved in favor of respondent.

In Claim 7, petitioner incorporates by reference the allegations of ineffective assistance as pled in Claims 2-6 above and alleges additional instances of ineffective assistance, arguing that trial counsel's numerous failures properly to advocate petitioner's defense cumulatively rendered counsel's assistance constitutionally inadequate. Petitioner alleges that the following actions of counsel were ineffective.

a. Stipulation to Firearm Use

At penalty, counsel stipulated that petitioner had been convicted of armed robbery and that he had been armed and had used a firearm in the commission of that robbery. Although counsel did not intend that the conviction be used as evidence in aggravation, evidence of the conviction was admitted and the jury was instructed to consider prior criminal activity involving the use of force as a factor in aggravation. Petitioner argues that counsel's stipulation was unreasonable because it lacked any tactical basis and permitted the introduction of the only evidence of prior violent criminal activity by petitioner.

Respondent submits that counsel's stipulation was reasonable and sound penalty strategy. Respondent contends that the prosecution could easily have established that petitioner was convicted of armed robbery and that petitioner was armed and used a weapon in the commission of that robbery. Counsel's stipulation avoided proof of that conviction and eliminated any live testimony from petitioner's robbery

victims. "'Hence, the stipulation was a reasonable and competent trial tactic for which counsel cannot be faulted.'" Mem. in Support of Summ. Jdgmt., p.45, quoting Butcher v. Marquez, 758 F.2d 373, 378 (9th Cir. 1985).

Absent any allegation from petitioner that petitioner was not armed and did not use a firearm in the commission of the robbery for 'which he was convicted, this court finds that counsel's stipulation was reasonable and cannot form the basis for an ineffective assistance of counsel claim. Accordingly, the court grants summary judgment on this aspect of Claim 7.

b. Failure to Object to Prosecutor's Argument

CALJIC 8.77 (1979 Revision) defined diminished capacity as follows:

> If you find from the evidence that at the time the alleged crime was committed, the defendant had substantially reduced mental capacity, whether caused by mental illness, mental defect, intoxication, or any other cause, you must consider what effect, if any, this diminished capacity had on the defendant's ability to form any of the specific mental states that are essential elements of murder and voluntary manslaughter.
>
> Thus, if you find that the defendant's mental capacity was diminished to the extent that you have a reasonable doubt whether he did, maturely and meaningfully, premeditate, deliberate, and reflect upon the gravity of his contemplated act, or form an intent to kill, you cannot find him guilty of a wilful, deliberate and premeditated murder of the first degree.

> Also, if you find that the defendant's mental capacity was diminished to the extent that you have a reasonable doubt whether he was able to form the mental states constituting either express or implied malice aforethought, you cannot find him guilty of murder of either the first or second degree.

The 1978 version of CALJIC 4.00 defined legal insanity. CALJIC 4.00, in relevant part, states:

> A person is legally insane if, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Petitioner claims that the prosecutor, in his closing argument at guilt, misstated the test for diminished capacity and erroneously suggested that the much higher standard of insanity governed the question of diminished capacity:

> You have had some instructions here concerning diminished capacity which is one of the ways you may find voluntary manslaughter. That's an instruction the prosecution will be very honest with you that the prosecution has turned over and over in its head and really is unable to see a diminished capacity, how that really operates. I suppose if you have an example where a person was taking LSD or some of the hallucinogenic type drugs then thought the other person was some kind of monster or some kind of animal, where he was hallucinating and then killed the person he would probably have diminished capacity. RT 2538.

> I think there is no question when you look at the evidence in this case and discuss it with each other and discuss it back and forth that you will see that this defense of diminished capacity just does not hold water, it's just not here. This is not a crazed man on drugs whose mind is wiped out and who is involved in some irrational behavior and as a result of that he really can't appreciate the malice aforethought or express an intent to unlawfully kill another human being, this is not case at all. RT 2558.

Petitioner also contends that the prosecutor improperly suggested that there must be a "but for" relationship between the use of drugs and the killings, when he argued : "[N]o one has been able to say if you take this drug it's going to make you kill somebody." RT 2595.

Petitioner claims that trial counsel's failure to object to these misstatements constituted ineffective assistance of counsel and, in effect, withdrew petitioner's primary defence, diminished capacity, from consideration by the jury.

Respondent insists that counsel's failure to object to the prosecutorial argument was not ineffective because the prosecutor's argument was entirely proper, noting that the California Supreme Court found that prosecutor's arguments were "fair comments on the evidence presented." See Dyer, 45 Cal.3d at 67. "The prosecutor found it difficult to believe that defendant was suffering from diminished capacity because he walked, talked, threatened, ordered, and murdered without ever indicating any objective signs of intoxication, lack of control, or lack of mental capacity." Ibid. After reviewing the record, this court agrees that the prosecutor's arguments were, with one exception,

fair comments on the evidence presented. See Darden v. Wainwright, 477 U.S. 168, 182 (1986) (no prosecutorial misconduct where improper argument invited by or responsive to defendant's case).

The court, however, agrees with petitioner that it was improper for the prosecutor to suggest that diminished capacity would be found if a person killed because hallucinogenic drugs caused him to believe the other person was a monster or wild animal. Such argument constituted a misstatement of the test for diminished capacity. Diminished capacity required only that petitioner be able to show that he was incapable of forming, due to intoxication, the specific mental state required of the crime. See CALJIC 8.77 (1979 Revision). However, even assuming that counsel's failure to object to this misstatement was unreasonable, petitioner has failed to establish prejudice. In order to establish prejudice, petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washinaton, 466 U.S. at 694. When determinina the existence of prejudice, the court "must consider the totality of the evidence before the judge or jury." Ibid. After reviewing the totality of the evidence before the jury, it is the decision of this court that even if counsel had objected to this misstatement by the prosecutor, there is no reasonable probability that the jury would have accepted petitioner's diminished capacity defence. The court also notes, as did the California Supreme Court, that immediately after making his argument, the prosecutor quoted the correct jury instructions on diminished capacity. See Dyer, 45 Cal.3d at 68; RT 2595. Accordingly, summary judgment will be granted on this aspect of petitioner's ineffective assistance claim.

c. Miscellaneous Failures to Object

Petitioner claims counsel was ineffective for failing to object: (1) when the prosecutor commented at penalty on petitioner's purported failure to express remorse and (2) when the prosecutor cross-examined Dr. Hilliard, petitioner's penalty phase expert, concerning (a) the contents of petitioner's probation report and (b) petitioner's propensity for future violence. Petition, p.55. However, even assuming it was unreasonable of counsel to fail to object to these questions and comments by the prosecutor, petitioner has failed to establish prejudice. In order to establish prejudice, petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washinqton, 466 U.S. at 694. When determining the existence of prejudice, the court "must consider the totality of the evidence before the judge or jury." Ibid. After reviewing the totality of the evidence before the jury, it is the decision of this court that even had counsel objected to these questions and comments by the prosecutor, there is no reasonable probability that the result of the proceeding would have been different. Accordingly, summary judgment will be granted on these aspects of petitioner's ineffective assistance claim.

CLAIM 8

In Claim 8, petitioner alleges prosecutorial misconduct. This claim is best understood in the context of Murray's relevance to the case.

Murray was one of two key prosecution witnesses against petitioner. She was the only witness other than petitioner to testify to the kind and quantity of drugs

which petitioner used on the night of the shootings. The extent of petitioner's drug use was crucial to petitioner's defense of diminished capacity. (ontrary to petitioner's testimony, Murray denied that she or anyone else used heroin at her apartment that night.: See RT-1738. She testified that the only drug used was cocaine. Ibid..

Petitioner submits a declaration from an investigator who swears that Murray admitted to him that she and Bennie Warren were heroin addicts and both were using heroin that night as were others. See SHP Ex.9. Petitioner also submits declarations from petitioner's sister and mother. They swear under penalty of perjury that Belinda Murray approached them during trial and claimed she would not testify "except for the fact that Jerry Curtis, the prosecutor, threatened that if she did not say exactly what he wanted her to say in exactly the way he told her to say it, he would have her locked up." Declaration of Patricia Jackson, SHP Ex.8, p.2. See also Declaration of Ellen Williams, SHP Ex. 10.[9] These declarations are inadmissible double hearsay and, as such, they do not support petitioner's prosecutorial misconduct claim or preclude the entry of summary judgment. See Blair Foods v. Ranchers Cotton Oil, 610 F.2d 665, 667 (9th Cir. 1980); Scripcs Clinic v. Genentech, 666 F.Supp. 1379, 1399 n.10 (N.D.Cal.1987).

Contrary to petitioner, it is not premature to decide Claim 8. The investigator's declaration simply raises possibilities of error in the state proceeding. This possibility, present in every adjudication, cannot afford basis for discovery in these collateral proceedings without substantially undermining the authority of the

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9. Cf. Declaration of prosecutor Jerry Curtis, SHO, Ex.A (Curtis swears he did not threaten or force Belinda Murray to testify and that he had nothing to do with the disposition of her case).

state courts and the presumption of correctness to which they are entitled. 28 U.S.C. § 2254.

At trial, petitioner's counsel attempted to cross-examine Murray regarding a prior arrest for burglary, a felony for which, a month before trial, she was permitted to plead to petty theft, a misdemeanor. See RT 1743. At a hearing in camera, Murray denied that her counsel or anyone from the district attorney's office had promised her favorable treatment in exchange for her testimony at petitioner's trial. RT 1740-1743. After hearing her testimony, the trial court ruled that cross-examination regarding the prior arrest and conviction would not be permitted.

Petitioner now claims prosecutorial misconduct based on the prosecutor's failure to bring Murray's probationary status to the trial court's attention at the time of the in camera hearing. Petitioner concedes that the prosecutor disclosed the fact of Murray's probationary status to petitioner's counsel when he turned over Murray's "rap sheet." See RT 1742-44. Nonetheless, petitioner argues that the prosecutor had a duty to disclose the fact of petitioner's probationary status at the in camera hearing when petitioner's counsel failed to do so. Petitioner claims that had the prosecutor done so, the trial court would have permitted cross-examination of Murray, at least as to the fact of her probation, and "it is reasonably probable that a result more favorable to [P]etitioner would have occurred at the guilt or penalty phases." Petition, p. 57.

Petitioner also claims that respondent misrepresented the fact of Murray's probationary status on appeal. Petition, p.59, citing RB 31 ("[n]either witness was on probation"). Respondent denies any misrepresentation was made, stating that "[t]he

appellate record does not reflect that Belinda Murray was on probation." Amended Memo. in Support of Summ. Jdgmt, p.49, n.12. The relevance of the appellate record to petitioner's misrepresentation claim is unclear to this court. However, without condoning misstatements, the court nonetheless agrees with respondent that petitioner had ample opportunity to correct this misstatement in his reply brief on his direct appeal or in state habeas briefs. More fundamentally, this court is unpersuaded that this misstatement is relevant to petitioner's prosecutorial misconduct claim, particularly since the court reviews this claim de novo.

Although the California Supreme Court noted that it is a "well-established principle that the defense is entitled to elicit evidence that a witness is on probation" because "[s]uch evidence is obviously probative of bias or motive," Dyer, 45 Cal.3d at 49-50, this court is unaware of any duty on the part of the prosecutor, after the prosecutor has disclosed the fact of a witness's probationary status tothe defence, to raise that fact to the attention of the court. Consequently, this court finds that these allegations, even if true, fail to state a claim for prosecutorial misconduct.

Moreover, even if the prosecutor's failure to bring this fact to the attention of the court were to constitute misconduct, the fact that Murray was on probation for petty theft was not of such significance as to deny petitioner a fair trial. See Greer v. Miller, 483 U.S. 756, 765 (1987). "To constitute a due process violation, the prosecutorial misconduct must be of 'sufficient significance to result in the denial of the defendant's right to a fair trial.'" Id. at 765 (supporting citations omitted). Accordingly, the court grants summary judgment in favor of respondent on Claim 8.

Claim 9

In Claim 9, petitioner alleges that the prosecution knew or should have known that Bennie Warren used drugs on the night of the crime and therefore that Warren was committing perjury when he testified to the contrary. Petition, p. 61. The prosecution is thus alleged to have knowingly used perjured testimony.

It is beyond question that a prosecutor may not knowingly present false testimony and has a concomitant duty to correct material testimony that is known to be false. See Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264, 269 (1959); United States v. Rivera Pedin, 861 F.2d 1522, 1529-30 (llth Cir. 1988).

Warren was one of two key prosecution witnesses. His testimony was critical to the jury's determination of petitioner's diminished capacity defence. At trial, Warren denied that he used any drugs on the night of the shootings and testified that petitioner, at the time of the killings, appeared meaner and madder than he had earlier in the evening but did not appear intoxicated. RT 1938, 1985. Defense counsel challenged this testimony and read into the record Warren's testimony at the preliminary hearing that petitioner had appeared intoxicated. RT 1986. Warren denied remembering that he had stated such. Ibid.

In essence, petitioner argues that if the jury had known that Warren was under the influence of drugs on the evening of the shootings, then Warren's testimony concerning petitioner's mental and physical state at the time of the crimes would have been discredited and, in

turn, petitioner's diminished capacity defense would have been strengthened.

The court notes that Warren's testimony had already been discredited by the discrepancy between his preliminary hearing and trial testimony. However, even assuming that knowledge of Warren's drug use at the time of the crimes would have made for an incremental difference in the eyes of the jury, petitioner fails to allege any factual basis for the assertion that the prosecution knew or should have known of Warren's drug use. To the contrary, petitioner has recently filed in this court a declaration executed by Warren which suggests that the prosecutor did not know, at least from Warren himself, of Warren's drug use on the night of the shootings:

> I testified at Alfred Dyer's trial that I had not used any drugs at Belinda's house because I was afraid to admit it to the prosecutor or in court.

Warren Declaration, ¶ 5, attached as Exhibit A to Declaration of Anne G. Bookin In Further Opposition to Respondents' Motion For Summ. Jdgmt.

Petitioner has failed to present any evidence that the prosecution knew or should have known that Warren's testimony was false – Absent knowledge, there can be no prosecutorial misconduct. See United States v. Rewald, 889 F.2d 836, 861 (9th Cir. 1989); Koch v. Puckett, 907 F.2d 524, 531 (5th Cir. 1990). Accordingly, the court grants respondent's motion for summary judgment on this aspect of Claim 9.

Claim 10

In Claim 10, petitioner asserts that the trial court erred when it excluded cross examination aimed at bringing out the favorable disposition of recent criminal charges against prosecution witnesses Murray and Warren. The trial court excluded this testimony after conducting a hearing in camera and determining that neither witness had reached any agreement with the government regarding favorable disposition of charges in exchange for favorable testimony. See RT 174143 (Murray); RT 1893-1911 (Warren). Petitioner claims that the jury should have heard this testimony and that its exclusion violated petitioner's rights under the Confrontation Clause. See Petition, pp.62-65.

The Sixth Amendment guarantees the right of one accused of a crime to be confronted with the witnesses against him. The right of confrontation is secured for defendants in state as well as federal criminal proceedings. Pointer v. Texas, 380 U.S. 400 (1965). This is more than the mere right of physical confrontation, but is the right to cross examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 315 (1974); Douglas v. Alabama, 380 U.S. 415, 41920 (1965). Cross examination includes the right to show a witness' possible bias or self-interest in testifying. Chioman v. Mercer, 628 F.2d 528, 530 (9th Cir. 1980); Skinner v. Cardwell, 564 F.2d 1381, 1388-89 (9th Cir.), cert. denied, 435 U.S. 1009 (1978).

The Confrontation Clause, however, does not prevent a trial judge from imposing limits on defense counsel's inquiry into the potential bias of a prosecution witness. Delaware v. Van Arsdall, 475 U.S. 673 (1986). Trial judges retain wide latitude to impose reasonable limits on cross examination based on concerns for,

among other things, harassment, prejudice, confusion of the issues, the safety of the witness as well as matters that are repetitive or only marginally relevant. Ibid. The harmless error standard is applicable to violations of the Confrontation Clause. Ibid. Petitioner claims that Murray had strong motive to testify against him falsely because she had been charged in October of 1982 with burglary; a felony. But approximately one month before she testified against petitioner in June of 1983, Murray was permitted to plead guilty to petty theft, a misdemeanor. Petition, p.63. The trial court, however, after hearing Murray in camera, determined that she had not received reduced charges in exchange for her testimony. RT 1740-1743. Unless one of 2254(d)'s eight exceptions applies, that determination is subject to the statutory presumption of correctness. Miller v. Fenton, 474 U.S. at 105. Petitioner has failed to make this showing.

Petitioner has submitted declarations from petitioner's sister and mother. They swear under penalty of perjury that Belinda Murray approached them during trial and claimed she would not testify "except for the fact that Jerry Curtis, the prosecutor, threatened that if she did not say exactly what he wanted her to say in exactly the way he told her to say it, he would have her locked up." Declaration of Patricia Jackson, SHP Ex.8, p.2. See also Declaration of Ellen Williams, SHP Ex. 10 (Murray told Williams she was forced by Jerry Curtis, the prosecutor to testify as she had because Curtis had cases pending against her and she did not want to go to jail).[10] These declarations are inadmissible double

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10. Cf. Declaration of prosecutor Jerry Curtis, SHO, Ex.A (Curtis swears he did not threaten or force Belinda Murray to testify and that he had nothing to do with the disposition of her case).

hearsay and, as such, they do not upset the statutory presumption of correctness.

Petitioner claims that Warren too had strong motive to testify against him falsely in June of 1983 because Warren had been arrested and charged in September of 1982 for receiving stolen property, having a loaded firearm in his possession and carrying a concealed weapon. Petition, p.63. These charges were subsequently dismissed. Ibid. After hearing Warren in camera, the trial court determined that his charges had not been dismissed in exchange for his testimony. RT 1740-1743. Unless one of 2254(d)'s eight exceptions applies, that determination is subject to the statutory presumption of correctness. Miller v. Fenton, 474 U.S. at 105.

The disposition of the charges against Warren was explored extensively at the trial court's in camera hearing. RT 1893-1922. Following Warren's 1982 arrest, Sgt. Frank Mellott of the Homicide Division of the Oakland Police Department told Warren he would "take care of" the charges. RT 1894-1895. Sgt. Mellott was chief investigator in the case against petitioner. RT 1901; Petition, p.63. In camera, Warren admitted that since the killings had occurred, he had worked with Sgt. Mellott on "other matters." RT 1910-1911. At one point, Warren stated his belief that the 1982 charges were dropped "because at the time the] was testifying" at a preliminary hearing against petitioner's coparticipants, who were tried separately from petitioner. RT 1911-1912. But when pressed by the district attorney, Warren admitted that he did not know for a fact that his charges had been dismissed in exchange for his testimony against petitioner's co-participants but was only speculating. RT 1911. Moments later, Warren informed the court that Sgt. Mellott had in fact told him

that the charges had been dropped because the complainant was "incompetent," "a crazy person, a nut." RT 1913, 1914.

After a voir dire of the witness, the court decided that the defense could elicit on cross examination the fact that Sgt. Mellott worked on this case and that Warren had worked with Mellott on other matters unrelated to this case. RT 1915; RT 1971. Defense counsel was permitted to impeach Warren with his prior convictions. RT 1972-1973. But the trial court decided that the fact of the dismissed charges would not be introduced before the jury. RT 1915-1916. In short, the trial court decided there was no evidence to support petitioner's allegation that charges against Warren were dismissed in exchange for favorable testimony inpetitioner's trial. The record supports this ruling. Petitioner has alleged no set of facts which would upset the presumption of correctness.

Given its findings, the trial court's actions are permissible limitations under the Confrontation Clause. See Van Arsdall, 475 U.S. at 673. Moreover, the impact of excluded lines of impeachment questioning on the credibility of these victim witnesses is negligible. As the California Supreme Court noted, (1) the witnesses denied any connection between the disposition of the charges against them and their testimony; (2) both coopperated with the prosecution prior to their arest on unrelated charges; (3) their charges were resolved before they testified against defendant; and (4) cross examination as to the disposition of those charges therefore would be irrelevant and unduly prejudicial to the prosecution. See Dyer, 45 Cal.3d at 48; see, also, RT 1741-43 (Murray) and RT 1893-1911 (Warren). In addition, the trial court noted concern for Warren's safety, RT 1957-69, and the jury was well aware that

both these witnesses had a strong motive for favoring the prosecution with their testimony -- petitioner had tried to kill them. See Dyer, 45 Cal.3d at 48. Any error in limiting the cross examinations was harmless beyond a reasonable doubt under Van Arsdall. 475 U.S. at 673.

CLAIM 11

In Claim 11, petitioner alleges that respondent has discovery order issued by the Alameda County Superior Court. Respondent insists that Petitioner has failed to state a federal claim. This court agrees.

Petitioner moved in Alameda County Superior Court for an order compelling certain discovery to be used in preparation of petitioner's state court habeas corpus petition. Specifically, petitioner requested documents tending to show that a David Mason confessed to the murders for which petitioner was convicted. See Bookin Dec, Ex. B, ¶ 20. Mason's counsel, Charles Marson of Remcho, Johansen & Purcell, reportedly called Jon Streeter, petitioner's counsel, and told him that Mason had confessed to multiple murders fitting the description of the crimes with which petitioner was charged and that this information was known to the police. Of course, double hearsay speculation of mistaken identity does not raise an issue for hearing.

On December 30, 1988, the Alameda County Superior Court granted petitioner's discovery motion. Respondent timely appealed to the First District Court of Appeal. On January 12, 1989, petitioner filed his state habeas petition in the California Supreme Court alleging, among other things, that court-ordered discovery had not yet been received and that it was necessary for the preparation and support of the habeas

corpus petition. On February 28, 1989, the California Supreme Court issued an order transferring respondent's appeal of the discovery order to itself, consolidating it with the habeas corpus petition.

On May 4, 1989, the California Supreme Court denied habeas relief and on May 18, 1989, dismissed as moot the appeal of the discovery order. The dismissal of the appeal did not vacate the discovery order, which, by its terms, is effective until petitioner is executed.

On September 7, 1989, petitioner made an ex parse application in Alameda Superior Court for an order to show cause why respondent should not be held in contempt for failure to comply with that court's discovery order. To date, no action has been taken on petitioner's application.

Petitioner asserts that respondent's failure to comply with the discovery order raises issues cognizable in federa; habeas corpus. Petitioner's assertion is wrong on the law. Petitioner claims that there is a deficiency in California's enforcement of its post-conviction discovery orders. However, "a petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings." Franzen v. Brinkman, 877 F.2d 26 (9th Cir.), cert. denied, 493 U.S. 1012 (1989). "A habeas petition must allege the petitioner's detention violates the constitution, a federal statute, or a treaty." Id. at 26, (supporting citations omitted). Claim 11, therefore, fails to state a federal constitutional claim and is accordingly not cognizable in federal habeas corpus proceedings.

In sum, for the reasons stated in this section, respondent's motion for summary judgment on Claim 11 will be granted.

CLAIM 12

Claim 12 involves the trial court's denial of petitioner's motion for a new trial based on assertedly newly discovered evidence. After the verdict and sentence, petitioner moved for new trial on the grounds he had just discovered two additional witnesses who saw him prior to committing the crimes for which he was sentenced. The witnesses, Robert Fluker and Carole Tiexiera, would, according to petitioner, have testified that petitioner was "spaced out" and "agitated or upset." Petitioner claims that had such testimony been heard, petitioner's diminished capacity defense would have been corroborated and a different result on retrial was probable. The trial court held a hearing and determined that the proffered evidence was not new. Dyer, 45 Cal.3d at 5253; RT 3019-20. Belinda Murray had recounted the fact of the encounter with Fluker and Tiexiera during her preliminary hearing testimony. CT 96; RT 3002. Murray also mentioned the encounter during her guilt phase testimony. RT 1628-29. The trial court's finding is presumed correct under 28 U.S.C. §2254 (d), and there is no indication of any deficiency in the trial court's fact-finding process on this matter.

The sole ground for the new trial motion was the assertedly new evidence. Once it was reliably determined that the evidence was not newly discovered, the new trial motion was properly denied. Respondent is therefore entitled to summary judgment on Claim 12.

CLAIM 13

Claim 13 is concerned with the trial court's interpretation of a stipulation between the prosecution and defense counsel. Petitioner alleges that the parties entered into a stipulation to the effect that no evidence

of petitioner's prior convictions would be elicited at the guilt phase of the trial. Petitioner contends that the trial court's interpretation of the stipulation deprived him of a fair trial and effective assistance of counsel as his trial strategy and presentation were executed in reliance on the stipulation.

The record discloses the following exchange:

> [PROSECUTION]: I would like to bring one other matter to the court's attention, that is, the Beaale motion that has been filed by Mr. Burris. We've informed the court somewhat informally, but I would like to state for the record that we do not intend to introduce any evidence of any of the prior convictions Mr. Dyer has suffered in these proceedings in this phase, but as far as this phase of the trial is concerned only, we do not intend to impeach him with any of his prior convictions.
>
> THE COURT: Very well. Mr. Burris I take it you withdraw your motion?
>
> THE COURT: You need not, of course. If it's not going to be offered, the motion would not be considered. With this recommendation from the District Attorney, none of the priors will be admissible.
>
> [DEFENSE]: That raises another question. Certainly, whether or not the prosecution's actions extend to any character witnesses that may be presented by the defence, that is to say, that those witnesses themselves will not be asked about their knowledge of any prior felony conviction that the defendant may have.

THE COURT: Mr. Curtis, do you care to respond?

[PROSECUTION]: It would apply to that. I will ask Mr. Burris to do what it pleases him to do, that we commonly do with our witnesses, that is, if they have that information available, ask the witness not to volunteer that knowledge in the event that I ask a question that is so broad that would inadvertently bring that responses [sic]. But the ruling, we assent to his request not to bring out in any way before this jury in this phase of the trial any nature concerning any prior convictions suffered by the defendant in this nhase of the trial.

[DEFENSE]: I'll accept that as a framework that we can work within.

THE COURT: I appreciate it, Counsel. You both understand the risks that are involved.

You'll be careful, I'm sure, to instruct all witnesses with respect to any such matters.

RT 2202-03.

After the stipulation was entered, Amanda Stevens was called to testify on petitioner's behalf. Stevens had worked with petitioner at the Oakland Head Start program. Stevens was called to testify to petitioner's reputation for veracity and non-violence. Before the witness could give her testimony, the court dismissed the jury and called for a conference. The prosecutor acknowledged the stipulation, but stated his understanding that it was inapplicable to this situation. He explained it was his understanding that the character witnesses referred to in the stipulation would be fellow

inmates from the prison at which petitioner had been held prior to trial. RT 2437.

The trial court had the portion of the record containing the agreement read back and heard arguments from counsel. The trial court determined "that there was not a meeting of the minds of the parties as to what was meant by the other side." RT 2438. The court stated that while a prudent prosecutor may waive cross examination as to priors used to impeach the defenAant himself, it would be unreasonable to have surrendered the right to cross examine a character witness who testified to those aspects of defendant's reputation. RT 2439-41. The trial court then indicated it would permit cross examination of Ms. Stevens using defendant's prior convictions. RT 2441, 244S. The trial then resumed. Defense counsel withdrew the question, cancelled plans to call an additional proposed character witness, and soon rested petitioner's case.

This court believes that it is within the discretion of a trial court to rule a stipulation inapplicable, despite literal language which might suggest applicability, because there was no meeting of the minds. After all, the trial court was in the best position to determine the meaning of the stipulation since it heard the parties when they initially entered into the stipulation and then later when they disputed its meaning.

But even assuming that the stipulation should have been construed as petitioner contends, the trial court's interpretation of the stipulation is not a claim cognizable on federal habeas corpus unless that interpretation rendered petitioner's trial fundamentally unfair. See Estelle v.

McGuire, 112 S.Ct. at 480, 484. It cannot be said that the trial court's interpretation of the stipulation rendered petitioner's trial fundamentally unfair, for as the alifornia Supreme Court noted, "the only 'prejudice' "petitioner] suffered is that he was denied the opportunity to offer unchallenged and unimpeachable evidence of his 'good' reputation." Dyer, 45 Cal.3d at 57-58. Summary judgment for respondent on Claim 13 is appropriate and will be entered.

CLAIMS 14 - 15

In Claim 14, petitioner argues that it was constitutional error to instruct the jury using former CALJIC 3.01 as modified by People v. Yarber, 90 Cal.App.3d 895 (1979). That instruction contains the elements of aiding and abetting.

An aiding and abetting instruction was given in this case because of the four people that petitioner and others were accused of shooting -- Bennie Warren, Belinda Murray, Nora Fluker and Floyd Murray -- there was no evidence that petitioner had shot Floyd Murray. The prosecutor conceded as much. RT 2533.

The jury convicted petitioner of four counts of kidnapping, two counts of attempted murder (Bernie and Belinda) and two counts of first degree murder (Nora and Floyd). Id. at 43-44. Since the jury found petitioner not guilty of inflicting great bodily harm on Floyd Murray, the jury implicitly found petitioner guilty of murdering Floyd Murray solely on the aiding and abetting theory. CT 395. Petitioner now argues that his conviction for the first degree murder of Floyd Murray must be reversed because the instructions improperly permitted the jury to convict petitioner of aiding and abetting Floyd's murder without finding that petitioner

specifically intended to aid Floyd's actual perpetrator in the killing.

The evidence at trial showed that petitioner wielded a .45 calibre automatic at the murder scene while one of the other participants, Michael Jackson, Dyer's stepbrother, was armed with a .38 calibre revolver. Dyer, 45 Cal.3d at 40: RT 1616, 1804, 1816, 1824. Petitioner ordered the victims out of the car. RT 1803-04. The four victims were then ordered to lie face down and shots followed shortly thereafter. RT 1804.

Despite being shot in the head at point-blank range, Bennie Warren lived and testified at petitioner's trial. Bennie had been a member of the National Rifle Association since he was thirteen, was very familiar with guns, see RT 1801 and 1807, and testified to the following. He heard three shots from the .38 come from his left where Belinda Murray was lying. RT 1806. Someone said, "This bitch ain't dead yet." RT 1928, 1931. He heard a few more shots and someone say "If she's not dead now, she'll be dead in the morning -- by morning." RT 1931. Bennie thought the additional shots also came from the .38. Ibid. Bennie then heard scuffling and shots from a .45. RT 1806-07, 1931. He looked up, saw petitioner holding the .45 about a foot away from Nora Fluker and watched as petitioner fired three shots into Nora's body. RT 1808-09; see also RT 1831. Petitioner then stepped in front of Bennie; Bennie got up on his knees; petitioner pointed the gun at Bennie's head and fired. RT 1809.

Nora Fluker's autopsy revealed at least one gunshot wound caused by a .38 and at least one gunshot wound caused by a .45. Id. at 41. Floyd's autopsy revealed that "at least" two of four gunshot wounds were caused by .38 calibre bullets. Ibid.

The trial court instructed the jury that in order to convict petitioner of Floyd Murray's murder, it must find that petitioner,

> with knowledge of the unlawful purpose of the person who directly and actively commit [ted] * * * the crime, intentionally aid[ed] or abett[ed] in its commission* * * or * * * intentionally advised and encouraged its commission * * *.
>
> A person aids and abets the commission of a crime if with knowledge of the unlawful purpose of the perpetrator of the crime, he intentionally aids, promotes, encourages or instigates by act or advice the commission of such crime.

RT 2511. The jury convicted petitioner of the first degree murder of Floyd Murray but, as it did not find petitioner guilty of inflicting great bodily harm on Floyd, the jury implicitly found petitioner guilty of murdering Floyd Murray solely on the aiding and abetting theory. CT 395.

In People v. Beeman, 35 Cal.3d 547, 561 (1984), the California Supreme Court held that an instruction such as the one quoted above is "sufficiently ambiguous to conceivably permit conviction upon a finding of an intentional act which aids, without necessarily requiring a finding of an intent to encourage or facilitate the criminal offence." And the California Supreme Court found that the pre-Beeman instruction given in this case constituted error, albeit harmless. Dyer, 45 Cal.3d at 60.

The Ninth Circuit too has ruled that Beeman error constitutes constitutional error. As the Ninth Circuit explained in Martinez v. Borg, 937 F.2d 422 (9th Cir. 1991):

> It is undisputed that the jury instruction on aiding and abetting was deficient under People v. Beeman * * * because the jury was not properly instructed that an aider and abettor must have the specific intent to aid the principal's crime. We agree * * * that Beeman error is constitutional error because the jury did not have the opportunity to find each element of the crime beyond a reasonable doubt.

937 F.2d at 423, citing In re Winship, 397 U.S. 358 (1970) and Carella v. California, 491 U.S. 263, 268-69, 270 (1989) (Scalia, J., concurring) ('misdescription of an element of the offense * * * deprives the jury of its factfinding role, and must be analyzed similarly [to a conclusive
presumption]').

At issue is whether the Beeman error here was harmless. Respondent maintains that the error was harmless under Chapman v. California, 386 U.S. 18 (1967) and Rose v. Clark, 478 U.S. 570 (1986). Amended Memo. In Support of Amended Answer to Petition, p.75. Petitioner disagrees and argues that the governing standard for harmless error analysis is not Chapman or Rose, but instead the harmless error analysis as set forth in Justice Scalia's concurring opinion in Carella (the "Carella test"). Because the Ninth Circuit adopted Justice Scalia's harmless error analysis inthe context of Beeman error, this court will do the same. See Martinez, 937 F.2d at 425: Hart v. Stacner, 935 F.2d 1007, 1010 (9th Cir. 1991).

Under the "Carella test," the error is harmless if "no rational jury would have made these findings without also finding that [petitioner] had the specific intent to aid the murder and attempted murder." Martinez, 937 F.2d at 425. In Martinez, the Ninth

Circuit ruled that the instructional error was not harmless because "[t]he record shows that the jury could have reached its verdict of aiding and abetting without finding that [petitioner] had the specific intent to aid and abet the murder and attempted murder." Ibid. "Because we cannot determine that the jury necessarily found specific intent in order to reach its verdict, the instructional error was not harmless." Id. at 426 (emphasis added).

Petitioner here argues that the facts of Martinez are "startlingly similar" to the facts of his case and, therefore, that this court cannot find the Beeman error committed in his case harmless. This is incorrect.

The facts of Martinez are strikingly dissimilar from the facts of this case. There, Martinez was convicted of aiding and abetting the second-degree murder of a peace officer and aiding and abetting the attempted murder of another peace officer. Martinez, 937 F.2d at 422. Although Martinez knew his co-participant in a robbery intended to kill the officers when the co-participant suddenly shot at them from the car window at point-blank range, Martinez argued he did not specifically intend to aid the murder but rather was an "involuntary witness" to the shooting. Id. at 425. The Ninth Circuit ruled that the jury could have found that Martinez aided the murder by supplying the murder weapon without necessarily finding that petitioner intended the gun to be used to kill the officers. Id. at 426.

Unlike the petitioner in Martinez who was unarmed, the petitioner here was convicted of personally murdering Nora and personally attempting to murder Bennie. Dyer, 45 Cal.3d at 44. All four victims were shot while petitioner and Jackson stood above

them. Id. at 40. While it seems at least theoretically possible that petitioner intended to kill Nora and Bennie, but did not intend to kill or intend to aid in the killing of Floyd, the record discloses no facts or fair inferences to support that inference in this case. It is inconceivable, on the facts of this case,[11] that petitioner would have intended to kill Bennie Warren, Belinda Murray and Nora Fluker but not Floyd Murray. Petitioner's intent that his acts aid the criminal purpose of Floyd Murray's murderer is conclusively established by the record to the extent that petitioner's intent is established as to his other victims.

The Ninth Circuit noted in Martinez that the harmless error standard in Carella was subsequently clarified in Yates v. Evatt, 111 S.Ct. 1884 (1991). Although the Yates' articulation "differs slightly" from Justice Scalia's articulation in Carella, the Ninth Circuit found that Yates did "not affect the outcome of this case." Martinez, 937 F.2d at 424, n.1. Would the Yates standard effect the outcome of this case?

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11. The California Supreme Court rejected petitioner's argument that a properly instructed jury could have found that petitioner intended to kill Bennie, Belinda and Nora but not Floyd:

> The evidence, coupled with the jury's findings, showed that [petitioner] (1) intentionally assisted in kidnapping Belinda, Bennie, Nora and Floyd; (2) joined in ordering the four victims into and out of the car and onto the ground: (3) personally and intentionally inflicted great bodily injury upon Bennie and Nora; (4) attempted to murder Bennie by shooting him in the head; (5) murdered Nora by firing three shots from a .4S calibre revolver into her body at close range. In addition, Ario had told [petitioner] at the apartment that, "if you kill one, you have to kill them, all" and [petitioner] replied he would not kill the babies.

45 Cal.3d at 65.

Under the Carella standard, conclusive presumptions, although unconstitutional, constitute harmless error where the predicate facts are so closely related to the ultimate facts to be presumed that no rational jury could find the predicate facts without also finding the ultimate fact. This court has concluded that the Beeman error in this case was harmless because the specific predicate facts in this case, demonstrating aiding and abetting, were so closely related tc the ultimate fact to be presumed, intent to aid and abet the murder of Floyd Murray, that no rational jury could have found the former without also finding the latter.

The Yates analysis varies somewhat from Carella. In Yates, mandatory rebuttable presumptions, although unconstitutional, constitute harmless error if: (1) the jury was instructed to consider evidence rebutting the presumption before accepting it and (2) the probative force of the evidence which the jury was instructed to consider was so overwhelming as to leave it beyond a reasonable doubt that the verdict would been the same absent the presumption. Yates, 111 S.Ct. at 1893. This court finds that the jury was instructed to consider evidence of aiding and abetting before accepting the presumption of intent, see RT 2511, and the aiding and abetting evidence which the jury was instructed to consider, was so overwhelming probative of intent that the verdict would have been the same absent the presumption. Thus, whether judged under Carella or Yates, the Beeman error in this case was harmless.

In a related claim, Claim 15, petitioner argues that the portion of the aiding and abetting instruction that imposes liability for "the natural and reasonable or probable consequence of any act that he knowingly aided or encouraged," RT 2510-11, impermissibly created a presumption of intent. But the instruction, as

the California Supreme Court pointed out, did not prejudice petitioner because the crimes for which he was convicted were the acts actually contemplated by the perpetrators and not the "natural and reasonable or probable consequence" of some other intended act. "The record firmly demonstrates that the particular crime being contemplated by [petitioner and his co-participants] was -- from the outset -- murder. Thus, the 'natural and reasonable or probable consequence' instruction could not have prejudiced [petitioner] under the facts of this case." Dyer, 45 Cal.3d at 65.

In sum, summary judgment is granted in favor of respondent on Claims 14 and 15.

CLAIMS 16 - 18

Claims 16, 17 and 18 concern assertions of error 1n specific jury instructions. A challenge to jury instructions solely as an error under state law does not state a claim cognizable in federal habeas corpus proceedings. Engle v. Isaac, 4S6 U.S. 107, 119 (1982). To obtain collateral relief for errors or omissions in the jury charge, the petitioner must show that the ailing instructions so infected the entire trial that the resulting conviction violates due process. Estelle v. McGuire, 112 S.Ct. at 480, 484 (1991); Prantil v. California, 843 F.2d 314 (9th Cir.) cert. denied 488 U.S. 861 (1988); Ahlewede v. Wolff, 720 F.2d 1108, 1111 (9th Cir.) cert. denied 469 U.S. 873 (1984); Ouiqq v. Crist, 616 F.2d 1107, 1111 (9th Cir.), cert. denied, 449 U.S. 922 (1980); Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988). The court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. United States v. Fradv, 456 U.S. 152, 169 (1982); Prantil v. California, 843 F.2d at 314. It must be borne in mind that jury instructions that are

"undesirable, erroneous or even universally condemned" do not qive rise to federal habeas relief unless they render the entire trial fundamentally unfair in violation of due process. Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

In Claim 16, petitioner claims that the jury instruction on malice aforethought erroneously omitted any mention of the jury's duty to find that petitioner was aware of his legal duty not to commit the wrongful acts. Petition, p. 89, citing RT 2513. Petitioner asserts that such an instruction was required to establish express malice as then defined under California law. Id. at 89, citing People v. Croy, 41 Cal.3d 1, 18-19 (1985).

Malice aforethought was necessary to petitioner's convictions for murder and attempted murder. See RT 2513. Petitioner concedes the omitted language regardinq petitioner's awareness of his legal duty not to commit wrongful acts was included in the court's instructions regarding diminished capacity. See RT 2521; CALJIC 8.77. But petitioner insists that the diminished capacity instructions did not act to cure the trial court's error as to the malice aforethought instruction. Petition, p. 89. Petitioner notes that even if the jury considered the definition of malice in the instructions regarding diminished capacity for purposes of deciding whether petitioner committed murder and attempted murder, the jury was then left with two inconsistent definitions of malice, one correct and one incorrect. Id., citing RT 2521-22, 2594.

Petitioner's primary defense was diminished capacity or lack of premeditation: he argued that he was guilty at most of voluntary manslaughter. Petitioner claims that the omission of the language concerning the awareness of the legal duty not to commit wrongful acts

from the malice aforethought instruction given in connection with the murder and attempted murder charges, "may have precluded the jury from properly determining the express malice issue and, at a minimum, resulted in the jury's confusion over the difference between the intent to kill which establishes malice and the intent to kill which establishes voluntary manslaughter." Id. at 94-95, citing RT 2578, 2580. Respondent maintains that Claim 16 fails to state a federal claim. Amended Memo. in Support of Answer to Petition, p.77. Although respondent concedes that relief is ava fable in collateral proceedings for errors in jury instructions which render a trial fundamentally unfair, respondent insists there was no such error here. Id. at 77, citing Kibbe, 431 U.S. at 154. This court agrees.

Petitioner's trial was not rendered fundamentally unfair by the trial court's failure to instruct the jury that in order to find malice aforethought, it must first find that petitioner was aware of his duty not to commit wrongful acts. This court holds, as a matter of law, that awareness of a duty not to commit wrongful acts was a requirement of state law and is not of constitutional dimension, particularly here where the jury, when it rejected petitioner's diminished capacity defense, implicitly found that petitioner was aware of his duty not to commit wrongful acts.[12] See RT 2521.

In Claim 17, petitioner claims that the trial court erroneously failed to instruct t.he jury, in contravention of California law, that an attempted murder conviction

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12. There was, as the California Supreme Court noted, other evidence at trial that tended to show that petitioner was aware of his duty not to kill. For example, there was testimony that petitioner explicitly refused to kill any children. RT 1727-28.

requires a finding of express malice and could not be based on implied malice. Petition, pp. 91-93, citing People v. Lee, 43 Cal.3d 666, 671 (1987). Petitioner objects to the following instruction which the court offered, apparently as a clarifying instruction, after the prosecutor's summation:

> Murder of the second degree is also the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfully to kill a human being but the evidence is insufficient to establish deliberation and premeditation. And. of course. as you've been earlier instructed. vou know that malice mav be either express or imclied. So the difference between the two has to do with deliberation and premeditation, which is present in first degree murder and not in second degree murder.

RT 2597-98 (emphasis added).

The California Supreme Court rejected petitioner's argument that this instruction, given in connection with the charge of murder in the second degree, could have affected the jury's specific finding that petitioner was guilty of two counts of attempted murder in the first degree when the jury had earlier been expressly instructed that a finding of express malice was required for a conviction of first degree murder. Dyer, 45 Cal.3d at 65; see also RT 2513-14, 262627, 2628. Consequently, any error of which petitioner claims regarding the instructions as to second degree murder did not affect the jury's first degree verdict. Petitioner claims that "[t]he jury was, in essence, informed that it could find Petitioner guilty of attempted murder -- even of the first degree -- without finding express malice." Petition, p.92. This statement is belied by the record. The trial court

instructed the jury: "All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice is murder of the first degree (emphasis added)." RT 2628.

Even if the jury was properly instructed as to express malice in regards to first degree murder, petitioner maintains the jury could nonetheless have believed that a conviction of attempted first degree murder could be based on implied malice. This claim is meritless. Not only is there no reasonably apparent ambiguity in the instruction, but under no view of the evidence can the instructions be said to have rendered petitioner's trial fundamentally unfair. Petitioner was convicted of attempted first degree murder, the instruction for which expressly required an element of specific intent. RT 2521.

In Claim 18, petitioner asserts that one of the jury instructions impermissibly shifted to the defense the burden of proof for one of the elements of the crimes charged. At one point in the instructions, the trial court, in distinguishing the elements of murder and manslaughter, stated:

> The distinction between murder and manslaughter is that murder requires malice while manslaughter does not.
>
> When the act causing the death, though unlawful, is done in the heat of passion or excited by a sudden quarrel such as amounts to adeauate provocation the offense is manslaughter. In such a case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.

> To establish that the killing is murder and not manslaughter, the burden is on the state to prove beyond a reasonable doubt each of the elements of the murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel.

RT 2518. Petitioner notes that the instruction omits any reference to the prosecutor's burden to prove beyond a reasonable doubt that petitioner's ability to harbor malice was not impaired by intoxication. "The instruction's silence on the issue, in conjunction with its express reference to the prosecutor's duty to negate evidence of the difficult defense of provocation," may have suggested to a reasonable juror that petitioner, rather than the prosecutor, bore the burden of proof on diminished capacity. Petition, p.95.

This view fails to take account of the instructions given as a whole. For the jury was also instructed repeatedly, separately and in connection with diminished capacity, that the state bore the burden of proving guilt beyond a reasonable doubt.

> Thus, if you find that defendant's mental capacity was diminished to the extent that you have a reasonable doubt whether he did maturely and meaningfully premeditate, deliberate and reflect upon the gravity of his contemplated act, or form an intent to kill, you cannot find him guilty of willful, deliberate and premeditated murder of the first degree.

RT 2521; see also RT 2502, 2509. Moreover, the jury was also instructed:

> If from all the evidence you have a reasonable doubt whether defendant was capable of forming such specific intent you must give the defendant the benefit of that doubt and find that he did not have such specific intent.

RT 2522. Finally, defense counsel expressly told the jury that "the prosecution has to prove to you, beyond a reasonable doubt, that Mr. Dyer's mind, his mental faculties, were not affected by * * * drugs." RT 2577.

After review of the entire jury charge, together with the arguments of counsel, the court concludes that petitioner's trial was not rendered fundamentally unfair by reason of the challenged instruction.

In sum, for the reasons stated, summary judgment will be granted in favor of respondent on Claims 16, 17 and 18.

CLAIM 19

Petitioner asserts error in the following instruction:

> If defendant Alfred Dyer was not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the commission of the murder in the first degree before you are permitted to find the alleged special circumstance of that first degree murder to be true as to defendant.

RT 2523-24 (emphasis added).

The quoted instruction relates to the special circumstance of multiple murder. Penal Code

190.2(a)(3). Under state law, a defendant is not death-eligible unless the prosecution charges and proves at the guilt phase, beyond a reasonable doubt, both that defendant has committed a first degree murder and the existence of a special circumstance. Penal Code 190.1(a), 190.2(a). Petitioner was charged with two multiple murder special circumstances, one for Nora Fluker and the other for Floyd Murray, and the jury found each multiple murder special circumstance true. RT 2623-24, 2625. Petitioner claims the multiple murder special circumstance instruction was error as to both Floyd Murray and Nora Fluker because "a reasonable juror could and would have construed this instruction as requiring only proof that Petitioner intentionally committed an act which assisted the actual killer, without also requiring proof that Petitioner specifically intended that the victim be killed." Petition, p.98. Petitioner relies on People v. Anderson, 43 Cal.3d 1104 (1987).

Anderson held that an instruction on intent is required in the context of a felony-murder aiding and abetting charge. See 43 Cal.3d 1104. Although there may have been no specific intent to kill on the part of one guilty of aiding and abetting felony-murder, intent must be found for the multiple murder special circumstance. Ibid. Therefore the additional instruction requiring intent ensures that before a felony-murder aider and abetter is eligible for the death penalty, the prosecution has proven beyond a reasonable doubt that the defendant intended to kill.

In this case, petitioner was convicted of the first degree murders of Nora Fluker and Floyd Murray. Petitioner was not charged with felony-murder. Because the jury found petitioner guilty of the first degree murder of Belinda Murray, with intent and infliction of

great bodily harm on her person, the concern in Anderson that intent was not tried in connection with the underlying crime is absent. Consequently, any error concerning the multiple murder circumstance instruction given in connection with the murder Of Belinda Murray was harmless.

However, because the jury found petitioner guilty of murdering Floyd Murray solely on the aiding and abetting theory,[13] the concern in Anderson that intent was not tried in connection with the underlying crime is present since the aiding and abetting instruction given at petitioner's trial did not expressly require that the jury find that petitioner specifically intended the killing. But because this court has found as a matter of law that under the facts of this case, the evidence was so probative of intent that no reasonable jury would have found that petitioner intended to aid the commission of the offense without also intending that Floyd Murray be killed,[14] any error as to the trial court's failure to instruct as to intent in the multiple murder special circumstance given in connection with the offense against Floyd Murray was harmless beyond a reasonable doubt.

Accordingly, respondent's motion for summary judgment as to Claim 19 will be granted.

CLAIMS 20 - 21

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13. Because the jury convicted petitioner of the first degree murder of Floyd Murray but found petitioner not guilty of inflicting great bodily harm on Floyd Murray, the jury implicitly found petitioner guilty of Floyd Murray's murder solely on an aiding and abetting theory. See RT 2626.

14. See, supra, Claims 14-15.

Petitioner next claims that the trial court impermissibly excluded mitigating evidence at the penalty phase of petitioner's trial. Specifically, the exclusion of evidence of the sentences received by petitioner's coparticipants, tried separately, forms the basis for Claim 20. The trial judge excluded the evidence on the ground that it was not relevant. Petitioner contends that he had the right to inform his sentencing jury that both of his coparticipants received life without parole.[15] Respondent argues that it would be prejudicial to admit such evidence because of the danger of jury confusion as to its role in light of the previous sentences for the same set of events. We begin witn general principles.

The purpose of the penalty phase of a capital trial is to give "individualized consideration" in the sentencing determination of each defendant. Lockett v. Ohio, 438 U.S. 586 (1978). The Eighth Amendment requires that the sentencing authority be permitted to consider "as a mitigating factor any aspect of the defendant's character or record and any of the circumstances of the offence." Id. at 604; Eddinas v. Oklahoma, 455 U.S. 104, 115 (1982). Death sentences must be invalidated where the sentencing body refused, or was not permitted, to consider any relevant mitigating evidence. Hitchcock v. Ducaer, 481 U.S. 393, 398-99 (1987).

Lockett itself, however, made clear that the trial court retains its "traditional authority * * * to exclude, as irrelevant, evidence not bearing on defendant's character, prior record, or the circumstances of the offense." Lockett, 438 U.S. at 604 n.12.

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15. The conviction of one co-participant, Cleveland Ario, was reversed on appeal. After retrial, Ario was convicted and sentenced to 31 years to life. People v. Ario, No. A032525, (Ct. App. 1987).

Here, the trial judge ruled that the sentences of petitioner's co-participants were not relevant to petitioner's character, background, record or the circumstances of his offence. RT 2676-77.

Petitioner cites a line of Florida state cases in which co-participants' sentences have been admitted at the penalty phase. E.g., Caillier v. State, 523 So.2d 158, 160 (1988). Contrary authority, however, comes from the Fifth Circuit in Broadon v. Blackburn, 790 F.2d 1164, 1169 (5th Cir.) cert. denied 481 U.S. 1042 (1987), as well as from the Supreme Courts of North Carolina, Alabama and New Jersey and the Oklahoma Court of Criminal Appeals. State v. Williams, 305 N.C. 656, cert. denied, 459 U.S. 1056 (1982); Coulter v. State, 438 So.2d 336, 344-46 (Ala. Crim. App.), aff'd, 438 So.2d 352 (Ala. 1983); State v. Gerald, 549 A.2d 792, 835-36 (N.J. 1988); Brogie v. State, 695 P.2d 538, 546-47 (Okra. Cf. Buttrum v. Black, 721 F.Supp. 1268, Crim. App. 1985) 1315 (N.D. Ga.) aff'd 908 F.2d 695 (llth Cir. 1990) (court found different degrees of culpability among co-participants relevant to individual sentencing of wife at separate trial but there co-participants were husband and wife and issue of psychological domination was raised).

As a matter of relevance, the co-participant's sentence relate neither to petitioner's character, record nor the circumstances of the offence. Indeed, admission of the evidence would seem to contravene the fundamental purpose of this aspect of the Eighth Amendment -- individualized sentencing. This court determines that the exclusion of the co-participants' sentences did not violate the Eighth Amendment and, accordingly, will grant respondent's motion for summary judgment on Claim 20.

In Claim 21, petitioner claims that the trial court improperly excluded at penalty the following mitigating evidence: certain testimony relating to petitioner's impoverished background; petitioner's emotions and feelings of remorse; petitioner's continuing relationship with his children; the circumstances of petitioner's decision to turn himself in; and testimony of petitioner's mother concerning her love for her son and her belief that he was not guilty of the crimes for which he had been convicted. Petition, p.103. Respondent disputes petitioner's assertion that the trial court prevented petitioner from introducing evidence on these points: "In fact, the trial court did not prevent petitioner from introducing evidence on all those points but merely sustained objections to particular questions posed by defense counsel." Amended Memo. In Support of Amended Answer, p.99. This court agrees. The trial court did not deprive petitioner of the opportunity to present mitigating evidence, but merely prevented petitioner from introducing inadmissible evidence.

Moreover, a review of the penalty phase record and the questions to which the objections were sustained reveals that the substance of each of the areas of inquiry precluded by the sustained objections was admitted into evidence elsewhere in the penalty phase trial. See, e.g., RT 158485, 2877-79, 2883 (testimony concerning impoverished childhood), 2889-90 (testimony concerning petitioner's relationship with his children). The sustained objections resulted in the exclusion only of answers to vague ~uestions, hearsay testimony and nonresponsive answers. See, e.g., RT 2738, 2749, 2890, 2893.

The principles of Lockett and Eddinas do not limit the court's authority to enforce compliance with fundamental evidentiary rules. A defendant does not

have an Eight Amendment right to present relevant mitigating evidence through improperly phrased questioning or through the use of unreliable hearsay testimony. Again, petitioner fails to identify a category or even an item of relevant mitigating evidence, as opposed to a particular question and answer, that was precluded by the trial court's rulings. This court finds no Eighth Amendment violation and, accordingly, will grant respondent's motion for summary judgment on Claim 21.

CLAIMS 22 - 24

Claims 22, 23 and 24 challenge certain penalty phase jury instructions on the grounds that they impermissibly limited the jury's consideration of mitigating evidence. Each challenged instruction tracks the language of Cal. Penal Code § 190.3 which enumerates the mitigating factors, including a "catch-all" mitigating factor, that may be considered by the penalty jury. Under Lockett and its progeny, penalty phase in~tructions as to consideration of mitigating factors must permit the jury to take into account and give effect to mitigating evidence of defendant's character, background, record and the circumstances of the offence. Recently, in Boyde v. California, 494 U.S. 370 (1990), the Supreme Court clarified the standard for judging the constitutionality of such instructions.

The Boyde Court set forth the standard for reviewing jury instructions for Lockett error. After noting that its decisions in the past had lacked uniformity on this standard, see Boyde at 1197, the Court held that:

> the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied

> the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition.

Id. at 1198.

First, petitioner contends that the following mitigating factor, Cal. Penal Code 190.3(d):

> [W]hether or not the offense was committed while defendant was under the influence of extreme mental or emotional disturbance,

RT 2924 (emphasis added), impermissibly limited the jury's consideration of petitioner's mental or emotional disturbances to those that are "extreme." See Petition, Claim 22, p.104. Petitioner contends that non-extreme mental disturbances are relevant mitigating factors that the jury must be permitted to consider. The Supreme Court rejected this same claim in Blystone v. Pennsylvania, 494 U.S. 299, 308 (1990), noting that such an instruction was not unconstitutional where the jury was also instructed to consider "any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offence." See also Proffitt v. Florida, 428 U.S. 242, 257-58 (1976) (upholding statute with identical provision). In petitioner's case, the jury was received instructed to "consider all of the evidence during any part of the trial," and to consider "any other circumstance which extenuates the gravity of the crime." RT 2923-24. These instructions were sufficient to permit the jury to give

effect to whatever mitigating value its members found in petitioner's non-extreme mental disturbance, if any. See also Cal. Penal Code § 190.3(h); RT 2924. In context, it cannot be said to be reasonably likely that the jury interpreted the challenged instruction so as to foreclose consideration of relevant mitigating evidence.

Petitioner next focuses on the following mitigating factor:

> Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was impaired as a result of mental disease or defect, or the effects of intoxication.

RT 2924 (emphasis added); Cal. Penal Code § 190.3(h). See Petition, Claim 23, p.106. Petitioner's argument here is particularly strained. Petitioner compares this quoted penalty phase instruction requiring mere "impairment" to a guilt phase diminished capacity instruction requiring "substantial impairment." Cf. RT 2521. Petitioner argues that the trial court had a duty to sue sponte instruct on the differences between the two instructions to ensure that the jury would not mistakenly require "substantially reduced mental capacity" before it considered mental impairment in mitigation. Petitioner submits that members of the jury could have believed that they could not consider the mental impairment evidence offered at penalty since they had rejected petitioner's diminished capacity defense at guilt.

There is no indication that the jury misunderstood its distinct roles in the distinct phases. At each phase, the jury was properly instructed as to the level of impairment required. The instructions were given at different phases of the trial separated not only

conceptually, but also in time. At guilt, the jury was instructed to find diminished capacity if petitioner suffered substantial impairment. Approximately a week later, at penalty, the jury was instructed to find a mitigating factor if petitioner suffered mere "impairment." There was no error.

Petitioner points to no evidence of jury confusion other than the similarity of the overall substantive concepts involved in the instructions. Petitioner's speculation of jury confusion does not even approach Boyde's standard of a "reasonably likelihood that the jury has applied the instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." 110 S.Ct. at 1197.

In the context of the entire jury charge, the jury was adequately instructed that it could consider petitioner's claim of impaired capacity as evidence mitigating against death even though the jury had already rejected petitioner's diminished capacity defense at guilt.

Finally, petitioner asserts that Cal Penal Code Section 190.3(k) (the "catch-all" instruction):

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime,

(given at RT 2924), impermissibly limits the jury's consideration of mitigating evidence to matters having to do with the crime itself. See Petition, Claim 24, p.109. Petitioner argues that the quoted instruction excludes from the jury's consideration non-crime related evidence.

Petitioner contends that Parker v. Dugger, 111 S.Ct. 731 (1991) requires reversal. But Parker is inapposite. There, the Court held that the trial court's failure to consider any nonstatutory mitigating evidence was unconstitutional. Here, the instruction did not preclude consideration of all nonstatutory mitigation. In Boyde, the Supreme Court found this very instruction, 190.3(k), constitutional:

> [W]e think there is not a reasonable likelihood that Boyde's jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character. The jury was instructed according to factor (k) that 'you shall consider * * * [a]ny other circumstances [sic] which extenuates the gravity of the crime even though it is not a legal excuse for the crime,' and the term 'extenuate' was defined by the court to mean 'to lessen the seriousness of a crime as by giving an excuse.' * * * Petitioner had the opportunity through factor (k) to argue that his background and character 'extenuated' or 'excused' the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence less than death. The instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstances [sic] of the crime which extenuates the gravity of the crime.' The jury was directed to consider any other circumstance that might excuse the crime, which certainly includes a defendant's backaround and character.

Boyde, 110 S.Ct. at 1198-99 (initial ellipses and brackets in original).

In sum, for the reasons stated, respondent's motion for summary judgment on Claims granted.

CLAIM 25

At the penalty phase Dr. Hilliard, a 22, 23 and 24 must be of petitioner's trial, psychologist, as an expert petitioner called witness. During cross examination of Dr. Hilliard, the prosecution asked him whether he had reviewed petitioner's probation report in the course of forming his professional opinions about petitioner's mental health. Dr. Hilliard replied that he had not. RT 2812. The prosecutor then showed Dr. Hilliard a copy of the report and asked him questions based on the report. Petitioner's counsel stated no objection to the use of the report or the prosecutor's question. RT 2812-14.

On direct appeal to the California Supreme Court, petitioner argued that the prosecution should not have been permitted to use the probation report on the grounds one that it was hearsay and therefore inadmissible and two, that use of the report violated the Fifth Amendment since the report contained self-incriminating statements. Without reaching the merits of the argument, the California Supreme Court rejected the claim stating that petitioner had waived his right to object by not making a timely objection at trial. "Defendant is precluded from raising the issue on appeal by his failure to preserve the point by appropriate objection in the trial court." Dyer, 45 Cal.3d at 71-72.

Respondent argues that the procedural bar doctrine bars petitioner from bringing this claim. RMSJ, p.4. Under that doctrine, when a state court refuses to hear a constitutional claim due to petitioner's own procedural

default, federal habeas review is similarly barred absent a showing of cause and prejudice. Coleman v. Thompson, 111 S.Ct. 2546 (1991); Wainwriaht v. Svkes, 433 U.S. 72 (1977). The only exception to this rule is "in [the] extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, [then] a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Murray v. Carrier, 477 U.S. at 496; see also McCleskev v. Zant, 111 S.Ct. at 1470. To show "actual innocence" in the penalty context, one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found petitioner eligible for the death penalty under state law. Sawyer v. Whitley, 1992 WL 13556S (June 22, 1992). Petitioner cannot make that showing here.

Petitioner argues that he can demonstrate cause for his procedural default. The cause petitioner alleges is trial counsel's supposed ineffective assistance. Ineffective assistance has been held to constitute cause under the procedural default doctrine. See Murray, 477 U.S. at 488: McCleskey, lll S.Ct. at 1470. But this court has already decided that even if counsel's failure to object to the use of the probation report was unreasonable, petitioner cannot establish "a reasonable probability that, but for ccunsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. at 694. Accordingly, summary judgment will be granted on this claim.

CLAIM 26

Petitioner claims that the trial court erred when overruled his objection to a hypothetical question posed by the prosecutor in cross-examining Dr. Hilliard, an expert witness. Petitioner alleges that the following hypothetical question suggested that petitioner used cocaine while working as a bus driver for a children's school:

> If you knew the person driving the bus at the Head Start School where your children [were] attending, and you knew that person was taking cocaine habitually, would you be concerned about your children?

RT 2825-26. Petitioner claims this hypothetical, based on facts not in evidence, was misleading, inflammatory, prejudicial and violated petitioner's confrontation rights, his right to a fair trial and his right to a reliable penalty determination. Petitioner cites Buttrum v. Black, 721 F.Supp. at 1268 and argues that here, as in that case, prejudice from the erroneous admission of this testimony spilled over to the penalty phase and requires new sentencing.

Respondent argues that petitioner has failed to state a federal claim. Questions of the admission of evidence and procedure are usually matters of state law. See Estelle v. McGuire, 112 S.Ct. at 475; Engle v. Isaac, 456 U.S. at 119; Lincoln v. Sunn, 807 F.2d 805, 816 (9th Cir. 1987); Bashor v. Risley, 730 F.2d 1228 (9th Cir.), cert. denied, 469 U.S. 838 (1984); Branch v. Cuno, 736 F.2d 533 (9th Cir.), cert. denied, 470 U.S. 1056 (1985). An improper evidentiary ruling, however, can result in the denial of due process in some circumstances. See Kealohapauole v. Shimoda, 800 F.2d 1463 (9th Cir.)

cert. denied 479 U.S. 1068 (1987); Gutierrez v. Griggs, 695 F.2d 1195 (9th Cir. 1983); Bashor, 730 F.2d at 1238. In order to raise a federal question, introduction of the evidence must have been so prejudicial as to have resulted in a denial of fundamental fairness. See Collev v. Sumner, 784 F.2d 984, 990 (9th Cir.) cert. denied 479 U.S. 839 (1986); Thomas v. Cardwell, 626 F.2d 1375, 1386 (9th Cir.) cert. denied, 449 U.S. 1089 (1981). Although this court questions the propriety of the prosecutor's hypothetical, the court cannot hold, in the context of the entire trial, that its admission was so inflammatory that it compromised the trial's fundamental fairness. See Campbell v. Kincheloe, 829 F.2d 1453, 1457 (9th Cir.) cert denied 488 U.S. 948 (1988). Accordingly, respondent's motion for summary judgment on Claim 26 will be granted.

CLAIM 27

Petitioner stipulated to a prior conviction for armed robbery but claims now, as he did at trial, that he did not stipulate to its use as an aggravating factor. See RT 2900. The trial court, based on that stipulation, took judicial notice of the fact that the prior conviction included an allegation of use of a firearm which had been found true. RT 2901. Petitioner's counsel objected,"admitt[ing] * * * he had stipulated to the firearm use finding, but that 'after having thought it through clearly, it was not [his] desire to stipulate that as an aggravating factor, [his] client had used a weapon.'" Dyer, 45 Cal.3d at 75 (emphasis added); see also RT 2899-2900. The court, over objection, instructed the jury that it could rely upon the conviction as a prior felony involving the use or attempted use of force or violence within the meaning of Cal. Penal Code § 190.3(b), and could use that fact as an aggravating factor in determining petitioner's sentence. RT 2925.

The prosecutor then argued at penalty that petitioner's armed robbery conviction showed that petitioner had used a gun and was prepared to kill in 1975. RT 2938--39.

Petitioner claims this alleged error deprived him of his right to a jury determination of the existence of an aggravating factor. Petition, p.116. The Ninth Circuit rejected a similar contention in Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir.1990), citing Walton v. Arizona, 497 U.S. 639 (1990).

Petitioner also contends, that absent judicial notice and the concomitant jury instruction, he would have been able to cast doubt on whether his prior conviction involved any violence or attempted violence. At the time of his conviction for armed robbery, petitioner avers the law permitted conviction based on vicarious culpability. Thus, his co-defendant's violence or attempted violence in the robbery could have been attributed to him by law. Petitioner alleges prejudicial error in that the armed robbery conviction was the only evidence of previous violence introduced against petitioner. The trial court determined that the stipulation to the prior included a stipulation to the "arming" and "use" clauses. RT 2901. Petitioner alleges that he could have been convicted of armed robbery based on his co-defendant's use of a firearm. But the trial court "took judicial notice of the file" and found that at the time of the commission of petitioner was armed and did use a firearm. RT the finding that the stipulation included the arming and use clauses and the underlying finding that petitioner was armed and did use a firearm are findings of fact. Petitioner does not now claim that he was not armed nor that he did not use a firearm but merely that the jury could have convicted him of armed robbery based on his codefendant's use of a firearm. There is no

allegation that there was any irregularity or omission of relevant information in the trial court's determination to accept the stipulation or in the court's determination that petitioner was armed and did use a firearm. 28 U.S.C. § 2254(d). Consequently, these facts are entitled to a presumption of correctness. Ibid.

Accordingly, summary judgment for respondent on Claims 27 is appropriate.

CLAIMS 28 - 29

Claims 28 and 29 are predicated on the contention that the trial court's instruction defining an aggravating circumstance could have been used by the jury to consider non-statutory aggravating circumstances in imposing the death sentence. "Under California law," according to petitioner, "the jury may not consider in aggravation evidence not relevant to the statutory factors." Petition, p.120, citing People v. Boyd, 38 Cal.3d 762 (1985).

The court instructed the jury that:

> [A]n aggravating circumstance is any fact or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the offense itself.

RT 2926.[16]

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16. Claim 33 is an allegation that this instruction unconstitutionally permitted the jury to consider extrastatutory aggravating factors. Claims 28, 29, 31, and 32 allege the particular non-statutory factors considered by the jury.

The prosecutor made comments in his closing arguments regarding the possibility of petitioner's dangerousness in prison. RT 2936. Claim 28 alleges that the jury, acting on the instruction set forth above, impermissibly considered petitioner's future dangerousness in aggravation.

In closing argument, the district attorney stated:

> you haven't heard one person get on this stand and say that Alfred Dyer * * * broke down and cried * * * saying, 'I'm sorry Floyd Murray got shot. I'm sorry I shot Belinda. I'm sorry I shot Nora Fluker,' or 'I'm sorry I shot Bennie." You haven't heard one person say that * * *. You don't see a person [over there] * * * drooped over the chair with tears running down his face * * *. That's not who you see over there sitting at the table. He is not there.

RT 2945-46. Claim 29 alleges that the jury, pursuant to the instruction defining aggravating factors, impermissibly considered lack of remorse for the crime as an aggravating factor. Petitioner argues that the prosecutor's remarks violated his right against self-incrimination as they were based solely on petitioner's demeanor and his failure to testify at the penalty phase.

With respect to future dangerousness, whatever the state rule regarding admission of such evidence or propriety of prosecutorial comment on the matter, the claim raises no federal constitutional issue. In Jurek v. Texas, 428 U.S. 262 (1976), the Court expressly approved a capital punishment statutory scheme that used future dangerousness as a principle aggravating factor in guiding the sentencer's discretion. Moreover, the U.S. Supreme Court has expressly assumed and

approved the consideration of future dangerousness by California penalty juries in connection with general assessment of character despite its absence as an express statutory aggravating factor. See California v. Ramos, 463 U.S. 992, 1006, n.20 (1983); see also Campbell v. Kincheloe, 829 F.2d at 1458.

With respect to lack of remorse, petitioner failed to object to the prosecutor's statements at trial and the California Supreme Court held petitioner was "therefore precluded from challenging them on appeal * * *." Dver, 45 Cal.3d at 82. Although the state supreme court went on to reject the claim on its merits, the United States Supreme Court has held that reaching the merits in the alternative does not vitiate a bar:

> [A] state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state-ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court alsa relies on federal law.

Harris v. Reed, 489 U.S. 255, 264 n.10 (1989).

Therefore, absent cause and prejudice, petitioner is barred from raising this claim on federal habeas. Coleman v. Thompson, 111 S.Ct. at 2554. Although petitioner could argue that counsel's supposed ineffective assistance constitutes cause for his procedural default, the court rejects this proposition as a matter of law. For even assuming that it was unreasonable of counsel to fail to object to these statements by the prosecutor, petitioner cannot establish prejudice. In order to establish prejudice, petitioner must demonstrate that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washinaton, 466 U.S. at 694. When determining the existence of prejudice, the court "must consider the totality of the evidence before the judge or jury." Ibid. After reviewing the totality of the evidence before the jury, it is the decision of this court that even if counsel had objected to these statements by the prosecutor regarding petitioner's lack of remorse, there is no reasonable probability that the result of the proceeding would have been different.

As petitioner has failed to establish cause and prejudice, petitioner is barred from raising this claim on federal habeas unless petitioner's claim implicates actual innocence. Coleman v. Thompson, 111 S.Ct. at 2554. To show "actual innocence" in the penalty context, one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found petitioner eligible for the death penalty under state law. Sawyer v. Whitley, 1992 WL 135565 (June 22, 1992). Petitioner has not and cannot make that showing here.

For the reasons stated, respondent's motion for summary judgment on Claims 28 and 29 will be granted.

CLAIM 30

Claim 30 is concerned with the assertedly erroneous admission of two categories of evidence -- post-mortem photographs of Nora Fluker and Floyd Murray and the bloodstained shirt of Floyd Murray. Petitioner characterizes the photographs as "gruesome" and the shirt as unduly inflammatory. In addition, petitioner protests the state's use, for demonstrative purposes, of replicas of the weapons -- .38 and .45

calibre handguns -- similar to those allegedly used in the crime.[17]

The standard by which federal habeas courts judge assertions of error in the admission of evidence is set forth in connection with Claim 26, above. No relief may be granted except upon a showing that the alleged error was so prejudicial as to have rendered the entire trial fundamentally unfair. E.g., Colley v. Sumner, 784 F.2d at 990.

The trial court found that the photographs were relevant to the issue of malice, hotly contested at trial. The shirt was also relevant to malice as its state suggested that the victim struggled prior to his death. See Dyer, 45 Cal.3d at 73 (a portion of the shirt was torn and a matching shred of cloth was found a short distance from the shirt).

The California Supreme Court found that the trial court's decision to admit the evidence was not an abuse of discretion since it could not be said that the probative value of the evidence was substantially outweighed by undue prejudice. Dyer, 45 Cal.3d at 73.

There was a great deal of testimony in the guilt phase from the surviving victims as well as from other witnesses regarding the unpleasant circumstances and morbid details of the crime. This court finds that any undue prejudice stemming from the introduction of the challenged evidence was diluted beyond any appreciable effect by the balance of the evidence which was admitted in any event.

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17. The actual murder weapons were never recovered. Petition, p. 124.

Given the relevance of this evidence and the considerable testimony documenting the gruesome facts of the crime, this court holds that admission of the challenged evidence did not render petitioner's trial fundamentally unfair. Accordingly, respondent's motion for summary judgmenc on Claim 30 will be granted.

CLAIMS 31 and 32

Claims 31 and 32 both involve the same underlying set of facts. During the guilt phase, there was testimony that petitioner used and sold narcotics and that petitioner, an ex-felon, possessed a firearm on the day before the murders. Petitioner had never been convicted of these crimes, the crimes were not charged at trial and the guilt phase jury was not asked to consider them in any way. At the penalty phase, the court instructed the jury that it could consider these prior "unconvicted" crimes in aggravation only if the jury was satisfied that the crimes had been proven true beyond a reasonable doubt. RT 2925, 2927.

In Claim 31, petitioner contends that the trial court improperly permitted the jury to consider unadjudicated, non-violent criminal activity as aggravating evidence under a statutory provision, California Penal Code Section 190.3, which permits prior unadjudicated crimes to be considered only if they "involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence." Petitioner claims federal constitutional error because the prosecution failed to prove that either the possession of a firearm or the possession or sale of narcotics involved the use or threat of force.

As to the trial court's reference to petitioner's possess of a weapon while an ex-felon, this court finds that this activity, as a matter of law, involved the implied threat to use force or violence. See California Penal Code § 190.3.

However, no threat of violence was implicated by petitioner's possession or sale of narcotics. And the court does not agree with respondent that petitioner invited the trial court's instruction as to drug possession and sale. See RT 2921 ("[t]here's some other evidence of uncharged offences, but they don't go to violence, such as possession of cocaine and/or selling of cocaine, but I don't think that (sic) fall within this language here").

But the court does agree with respondent that the federal constitution does not preclude the introduction of unadjudicated, nonviolent criminal activity at a capital penalty trial. An error of state law is not a ground for relief in federal habeas unless the error rendered petitioner's trial fundamentally unfair. "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." Estelle v. McGuire, 112 S.Ct. at 475. Consideration of petitioner's prior possession and sale of narcotics may have violated state law, but it did not render petitioner's trial fundamentally unfair. See Harris v. Pulley, 692 F.2d 1189, 1193-1194 (9th Cir.), rev'd on other grounds, 465 U.S. 37 (1984) (consideration of nonstatutory aggravating factors "is not objectionable in itself, as long as at least one statutory circumstance is found before the death penalty is imposed"). See also Proffitt v. Florida, 428 U.S. at 256-257, n.14 (where Court upheld a sentencing statute that allowed the jury to consider nonstatutory, aggravating factors).

In Claim 32, petitioner argues that this same instruction, concerning the consideration of unadjudicated criminal activity, was unconstitutional for other reasons. First, petitioner argues that the court should have instructed the jury as to the elements of each unadjudicated offense and that each element must be found true unanimously beyond a reasonable doubt. Petition, p.129. This court is unaware of any such requirement. Cf. Ramos, 463 U.S. at 1008 n. 21 ("Sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does"): and Harris v. Pulley, 692 F.2d at 1195 (9th Cir.) rev'd on other grounds 465 U.S. 37 (1984) (beyond a reasonable doubt standard does not apply to jury decision that death is appropriate because aggravating circumstances outweigh mitigating circumstances). Consequently, petitioner is arguing for a new rule. Federal habeas courts are prohibited from announcing new rules under Teague v. Lane, 489 U.S. 288 (1989).

Second, petitioner argues that evidence of unadjudicated crimes is insufficiently reliable for use in penalty proceedings. The trial judge's repeated admonition to the jury not to consider this evidence unless satisfied beyond a reasonable doubt of its truth served as an effective check on any deficiencies in proof of the unadjudicated offences. Particularly in light of this clear admonition, it is not "reasonably likely" that petitioner's jury applied the instructions unconstitutionally. Cf. Boyde, 110 S.Ct. at 1198. Again, this court agrees with respondent that the federal constitution does not preclude the introduction of unadjudicated, nonviolent criminal activity at a capital penalty trial.

Petitioner also argues that having the same jury determine whether petitioner committed these crimes as well as whether petitioner should be given the death sentence deprives petitioner of his right to an unbiased tribunal. The court can see no basis for this argument. Relevant information should not be kept from the penalty jury. To the contrary, the penalty jury should have access to all information about a defendant in order to make the most informed decision. Moreover, such a ruling would entail the announcement of a new rule in violation of Teague.

Petitioner also claims counsel was ineffective for failing to object to the court's instruction permitting consideration of nonviolent, unadjudicated crimes. Because we find no trial court error as to the instruction regarding possession of the weapon, and harmless error as to the instruction regarding possession and sale of narcotics, it follows that counsel is not ineffective for failing to object to such instructions.

For the reasons stated, respondent's motion for summary judgment on Claims 31 and 32 will be granted.

CLAIM 33

In Claim 33, petitioner asserts that his penalty jury unconstitutionally considered non-statutory aggravating factors -- matters that are not enumerated in the Cal. Penal Code § 190.3 list of aggravating factors. Many of the allegations of Claim 33 have been treated in connection with Claims 28, 29, 31 and 32. To the extent petitioner in Claim 33 alleges the jury impermissibly considered any other nonstatutory aggravating factors -- in addition to those alleged in Claims 28, 29, 31 and 32 -- the court rejects the claim. The thrust of the claim is

based on the argument that the trial court's definition of aggravating circumstances may have been construed by the jury to permit consideration of any aggravating circumstance rather than strictly those enumerated by the statute. A look at the context of the instruction leaves no doubt it is not reasonably likely the jury was so misled. The court instructed as follows:

> You are instructed that an aggravating circumstance is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the offense itself.
>
> You are instructed that an aggravating circumstance is any fact, condition or event which, as such, does not constitute a justification or excuse for the offense in question, but which may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> It will be your duty * * * to determine which of the two penalties * * * shall be imposed on the defendant. After having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have heen instructed.

RT 2925-26.

It is plain from this passage that the jury was focused on the instructed statutory circumstances and that the definitions of aggravating and mitigating circumstances were given as an aid in understanding the statutory factors. Petitioner simply takes the definition

out of the context of the overall charge and argues essentially that it served to unbridle the sentencer's discretion giving the penalty jury carte blanche in selecting a basis for choosing the penalty. The context, once restored, shows that the sentencer was adequately guided by the instructions.

Even assuming that the jury considered nonstatutory aggravating factors, such consideration "is not objectionable in itself, as long as at least one statutory circumstance is found before the death penalty is imposed." Harris v. Pullev, 692 F.2d at 1193-1194 (9th Cir.), rev'd on other grounds,465 U.S. 37 (1984). See also Proffitt v. Florida, 428 U.S. at 256-257, n.14 (where the Court upheld a sentencinq statute that allowed the jury to consider nonstatutory, aggravating factors).

Accordingly, summary judgment in respondent's favor on Claim 33 is warranted.

CLAIM 34

In Claim 34, petitioner asserts that it was error for the trial court not to have sue sponte parsed out from the statute the inapplicable mitigating factors and instructed the jury using only the applicable factors. Petitioner argues that the jury could have construed the absence of a mitigating circumstance as an aggravating factor. In support of this argument, petitioner points to the prosecutor's remarks in closing argument in which he analyzed the factors seriatim, each time concluding that no mitigating circumstance existed. RT 2941-43.

No federal constitutional claim is raised by these arguments. First, the prosecution never stated that the absence of a mitigating circumstance should be construed as a factor in aggravation. See RT 2941-2943.

Moreover, a state may employ any set of mitigating and aggravating factors so long as they meaningfully channel the sentencer' discretion and permit the sentencer to give effect to all relevant mitigating evidence in connection with the defendant and the circumstances of the crime. Lockett, 438 U.S. at 604; Gregg v. Georgia, 428 U.S. 153, 176, 189-95 (1976). The content of the substantive factors that should be deemed relevant to the capital sentencing decision is left to the states and their legislatures to provide. Ramos, 463 U.S. at 999-1001. There is no authority requiring that a state must delete inapplicable mitigating circumstances. To the contrary, the Ninth Circuit has rejected a similar challenge to the state of Washington's sentencing statute. See Campbell v. Kincheloe, 829 F.2d at 1458-59. Accordingly, summary judgment will be entered in respondent's favor on Claim 34.

CLAIM 35

Petitioner claims federal constitutional error because the trial court failed to instruct the jury that it may impose death only if it was persuaded beyond a reasonable doubt that aggravating factors outweighed mitigating factors and that death was the only appropriate punishment. In Harris v. Pulley, 692 F.2d at 1194-1195 (9th Cir.), rev'd on other grounds 465 U.S. 37 (1984), the Ninth Circuit rejected this very claim. The "United States Supreme Court has never stated that a beyond-a-reasonabledoubt standard is required when determining whether a death penalty should be imposed." Id. at 1195. See also Wade v. Vasquez, 752 F.Supp. at 935 (accord). Therefore, summary judgment in favor of respondent shall be granted on this claim.

CLAIM 36

Under the California death penalty scheme, a defendant must be found guilty of first degree murder and the trier of fact must find true at least one statutory "special circumstance" before a defendant may be sentenced to death. Section 190.2 of the Cal. Penal Code provides the statutory special circumstances that may be charged in order for a defendant to become "death eligible." If any of the charged special circumstances are found true by the trier of fact, the trial proceeds to the penalty phase to determine whether the penalty shall be fixed at life imprisonment without possibility of parole or death. Id. at § 190.3.

Petitioner was charged with, and the jury found true, the following special circumstances: with respect to the murder of Floyd Murray, multiple-murder; with respect to the murder of Nora Fluker, multiple-murder. See Dyer, 45 Cal.3d at 69. Both respondent and the California Supreme Court agree that this was error. Amended Memo. In Support of Amended Answer, p.131; 45 Cal.3d at 69.

Petitioner argues that instructional errors such as this one are not subject to a "harmless error" analysis under Chapman v. California, 386 U.S. at 24 (constitutional error harmless if "proven beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained").[18] In Chapman, the Court noted several categories of constitutional error that are harmful per se and not subject to harmless error analysis. The Court cited as examples,

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18. Capital cases are not exempt from harmless error analysis. See Satterwhite v. Texas, 486 U.S. 249 (1988); Gilbert v. California, 388 U.S. 263 (1967).

Gideon v. Wainwriaht, 372 U.S. 335 (1963) (denial of right to counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (introduction of coerced confession); and Tumev v. Ohio, 273 U.S. 510 (1927) (adjudication by biased judge). Since Chapman, the Court has added to the list of constitutional violations that merit per se reversal. E.q., Waller v. Georgia, 467 U.S. 39, 49, n.9 (1984) (public trial); Holloway v. Arkansas, 435 U;S. 475 (1978) (conflict of interest in representation); Faretta v. California, 422 U.S. 806 (1975) (self-representation); Price v. Georgia, 398 U.S. 323 (1970) (double jeopardy). Nonetheless, "errors to which Chapman does not apply * * * are the exception and not the rule." Rose v. Clark, 478 U.S. at 578.

This case does not involve an erroneous instruction on an essential element of one of the crimes charged. Here, the instructional error was made in connection with a special circumstance that became superfluous when the other special circumstance, properly instructed, was found true. See Cal. Penal Code § 190.3. Thus, even if the trial court were to have ordered the uninstructed special circumstance stricken, petitioner would still have been death-eligible. The additional special circumstance of multiple murder is simply not an issue because the other properly instructed special circumstance, which was found true, sufficed to make petitioner death eligible. The case would be different if only one special circumstance had been charged and it had been erroneous. On these facts, however, this Court holds that the harmless error rule of Chapman applies and the instructional error was harmless at petitioner's guilt phase trial.

An issue does arise, however, in connection with the use of special circumstances found true in the guilt phase as aggravating factors in the penalty phase. Under

Cal. Penal Code § 190.3(a), any special circumstance found to be true may be considered as an aggravating factor at penalty. Aggravating factors must be weighed against mitigating circumstances to determine the appropriate penalty -- life without possibility of parole or death. Id. at § 190.3. Petitioner argues that he was prejudiced by use of the uncharged special circumstance as an aggravating factor at the penalty phase.

The Ninth Circuit considered essentially the same claim in Harris v. Pulley, 692 F.2d at 1203 (9th Cir.) rev'd on other grounds 465 U.S. 37 (1984). In Harris, the court had before it petitioner's appeal from the district court's denial of a writ of habeas corpus. The state had charged petitioner Harris with two murders and three special circumstances for each murder: (1) multiple murders; (2) murder during robbery; and (3) murder during kidnapping. Ibid. "Thus, Harris was charged with six special circumstances, all of which the jury unanimously found to be true beyond a reasonable doubt." Ibid. Harris argued that so charging him was unlawfully duplicative and he was prejudiced because it "artificially inflated the aggravating factors considered by the jury in determining Harris' penalty." Ibid.

The court seemed to assume that the double charging was error. Nonetheless, the court stated:

> We conclude that the jury could not have been misled in this case by the duplicative charging of special circumstances. It was clear throughout the trial that two mutders, and not four, were committed and that both murders arose out of the same incident. It is highly unlikely that the jury simply counted up the special circumstances charged and based its verdict on such calculation.

> We cannot reverse on the basis of speculation of that nature.

Ibid. Thus, the court identified two factors that rendered the error harmless:[19] (1) the clarity from the record of the facts charged despite the duplicative charging of the special circumstances and (2) the extreme remoteness of the possibility that the jury performed a mechanical counting up of factors in aggravation and in mitigation and based its decision on which had registered more tallies. Ibid.

In this case, there was likewise a clear record of what was being charged. Petitioner does not argue that the jury was misled or confused as to precisely what acts petitioner was charged with committing. And the jury was expressly instructed not to count up the mitigating and aggravating factors in a simple mechanical fashion. To the contrary, the trial court, in its final instructions to the jury at the penalty trial, admonished:

> You must not decide the issue of the appropriate penalty by simply counting the number of aggravating versus mitigating circumstances.

RT 2927. Accordingly, respondent's motion for summary judgment as to Claim 36 will be granted.

CLAIM 37

California Penal Code Sections 190.3 (a-k) set forth factors to be considered by the jury at penalty. The first

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19. Implicit in the court's holding is that the type of error complained of -- jury instructions resulting in undue inflation of aggravating factors at the penalty trial -- is subject to harmless error analysis.

three of these factors are susceptible of an interpretation so as to permit double or triple counting by the jury of aggravating circumstance allegations. The instructions track verbatim the language of Cal. Penal Code § 190.3 (a-c):

> a) the circumstances of the crime of which the defendant was convicted in the present proceeding, and the existence of any special circumstances found to be true,
>
> b) the presence or absence of criminal activity by the defendant which involved the use, or attempted use, of force or violence, or the expressed or implied threat to use force or violence,
>
> c) the presence or absence of any prior felony convictions.

RT 2924.

Petitioner's contention is that the murders of which petitioner was convicted in this case could be counted under each of the three factors and thus impermissibly allowed for "triple counting," resulting in more weight in aggravation than should have been assessed. Petitioner makes a similar argument with respect to petitioner's prior armed robbery conviction, contending it could have been "double counted" under factors b and c. Petitioner argues that the trial court erred in not giving a limiting instruction making clear which acts may be considered under which factors. This court rejects this claim on several grounds.

First, there is no indication of actual jury confusion or of this jury's inclination in this case to double or

triple count. Second, the trial court, in its parting instruction to the jury, admonished:

> You must not decide the issue of the appropriate penalty by simply counting the number of aggravating versus mitigating circumstances. Instead, you must weigh the varying circumstances.

RT 2927. This instruction is the very limiting instruction petitioner asserts is missing. It expressly discourages the misconceptions that would lead to errors such as double or triple counting. Moreover, so long as the class of death-eligible persons is narrowed in either the sentencing or guilt phase of the trial, both the Supreme Court and the Ninth Circuit have rejected similar "double-counting" claims. Cf. Lowenfield v. Phelps, 484 U.S. 231 (1988) (upheld capital sentencing scheme in which intent to kill more than one person is element of first degree murder and an aggravating factor): and McKenzie v. Risley, 842 F.2d 1525, 1539 (9th Cir.) (en bane) (death by means of torture may be both an element of the crime and an aggravating factor), cert. denied 488 U.S. 901 (1988). California's class of death-eligible persons is narrowed both at guilt and at sentencing. See California Penal Code §§ 190.2(a)(1-19), 190.3(a-k).

Finally, petitioner's argument, if accepted by this court, would constitute a new rule in violation of Teague.

Accordingly, for the reasons stated, summer judgment on Claim 37 will be granted in respondent's favor.

CLAIM 38

In this claim, petitioner seizes upon a passage from the trial judge's ruling on petitioner's motion to modify the death sentence, takes it out of context and argues from it that the trial court used an erroneous standard in ruling on the motion.

The passage petitioner objects to reads: "It is not my responsibility * * * to act upon mercy, nor do I have the power to act upon mercy * * * ." RT 3046. Petitioner cites Eddinas, 455 U.S. at 104 and Lockett, 438 U.S. at 586 and People v. Lanphear, 36 Cal.3d 163, 166 (1984) for the proposition that the trial judge does indeed have the power to act upon mercy. Lockett and Eddings both require that the sentencer not be precluded from considering any mitigating evidence relevant to defendant's character, background or the circumstances of his offence. The California Supreme Court in Langhear ruled that the sentencer must be permitted to consider sympathy for the defendant as a factor in mitigation at the penalty phase. Id.

However, in California v. Brown, 479 U.S. 538, 542 (1987), the Court approved an "antisympathy" instruction admonishinq the sentencer not to be swayed by "mere * * * sympathy." The court reasoned precludes only what is properly precluded -- emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase. Id.

Placed in context, the trial judge's statement reveals itself as a stance, like that approved in Brown, eschewing "mere sympathy," an unreasoned emotional response based on matters outside the evidence in this case.

> I weigh my responsibility very heavily. And I considered every scrap of evidence that came to my disposal by way of the trial evidence, by way of the arguments of counsel * * *. I have carefully considered this matter both as an individual, as head of a family, as the father of children, indeed, as a black person looking out to see that Mr. Dyer is black and that he comes from a black family, and with some acquaintanceship with drugs and their effects and likely effects upon individual human beings.

RT 3046. Far from abandoning his role, the trial judge performed a searching inquiry and arrived at his conclusion only after painstaking and diligent review. The factors surveyed by the trial judge were factors associated with sympathy for defendant. The trial court did not err in its rulinq.

In sum, petitioner's claim is rejected and respcndent's motion for summary judgment on Claim 38 will be granted.

CLAIMS 39 - 40

Claims 39 and 40 are both concerned with the exclusion of two prospective jurors. In Claim 39, petitioner complains that the equivocal voir dire responses of prospective jurors Frazier and Davidson were insufficient to support their removal for cause.

In Witherscoon v. Illinois, 391 U.S. 510, 522 (1968), the Court held that:

> A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty

> or expressed conscientious or religious scruples against its infliction.

However, the Witherspoon standard was refined in Wainwright v. Witt, 469 U.S. 412, 433 (1985), permitting exclusion for cause when a prospective juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." As the Court explained in Adams v. Texas, 448 U.S. 38, 46 (1980):

> If the juror is to obey his oath and follow the law * * *, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias. The State does not violate the Witherspoon doctrine when it excludes perspective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality.

Petitioner insists that the trial court erroneously and unconstitutionally excluded prospective juror Davidson under Adams and Lockhart v. McCree, 476 U.S. 162 (1986). Memo in Opp. to Summ. Jdgmt., pp. 148, 150.

In McCree, Justice Rhenquist wrote:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

476 U.S. at 176. And in Adams, the Court cautioned trial courts against overly broad exclusion:

> [N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. 448 U.S. at 50.
>
> [T]o exclude all jurors who would be in the slightest way affected by the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law. Ibid.

Petitioner maintains that because Davidson claimed she could follow the law, she should not have been disqualified despite her numerous equivocal remarks concerning her ability to impose the death penalty under any circumstances. Id. at 151, citing RT 922-23. This court is satisfied that Juror Davidson was properly excluded.

Juror Davidson made many statements supporting her exclusion:

> Q: Are you saying that you would never in any and all events, no matter what the crime, no matter how heinous it was, no matter how disgusting it was, no matter how reprehensible, no matter how horrible, and no matter that the jury determined that first degree murder occurred, and no matter [that] the jury, including you, determined that the Special Circumstance was true, and no matter that you were persuaded that it was proper in that case, you would just refuse to vote for the death penalty?

A: I probably wouldn't, no. I cannot vote for the death penalty. RT 921.

Q: There is nothing at all that could come before you that would allow for you to entertain the prospects of imposing the death penalty?

A: Well, as I sit here and I feel nervous and sick about it. I think my answer has to be no.

Q: Is the no a function of just being placed on the spot * * * [or] you really couldn't ever do it [vote for death] under any set of circumstances, no matter what the fact pattern happened to be?

A: I think I could not do it. I could not vote for the death penalty. RT 928-29.

This court agrees with the trial court that "[u]ndeniably, on this record it is clear that the juror could not impose the death penalty." Rt 929. Accordingly, the exclusion of Davidson was proper under Witt.

Petitioner claims the exclusion of prospective juror Frazier was also improper. As petitioner himself notes, Frazier's initial responses were "highly pro-death:"

Once I've been through the first part of the trial and decided a person has actually committed the crimes, I would hope that it turned out the person did not, but if I were convinced along with 11 other people that this person committed such crimes, as I stated before, it would be difficult to vote against the death penalty, although I would very seriously consider life without the benefit of parole.

Memo in Opp. to Summ. Jdgmt., p.154, citing RT 709. However, when Frazier later was asked about media exposure, he informed the court that he had recently read a newspaper article about a double murder trial and that his sister had served on the jury in that trial. See RT 1136 et seq. After reading about the trial and talking to his sister, Frazier found the two cases very simil-ar and no longer felt he had an open mind:

> Q: You would automatically in every case, no matter what the evidence, no matter how heinous, ugly, terrible the crime, you would always vote for life without the possibility of parole?
>
> A: Probably, yes.
>
> Q: Is it probably or is it yes? A: Yes.

RT 1141. This response was sufficient to disqualify Frazier under Witt.
Because Davidson and Frazier at times did claim they would be able to follow the law, petitioner argues, pursuant to 2254(d)(8), that the trial court's findings are not supported by the record and should not be accorded the statutory presumption of correctness. This court disagrees.

The fact that both these potential jurors claimed that they were able to follow the law does not vitiate their unequivocal remarks which clearly establish that the views of these two potential jurors would have "prevent[ed] or substantially impair[ed] the performance of [their] duties as juror[s] in accordance with [their] instructions and [their] oath[s]." Witt, 469 U.S. at 433. When the Court modified Witherspoon in Witt, the Court expressly noted that a juror's inability to follow

the law did not have to be proved with "'unmistakable clarity.'" Witt, 469 U.S. at 424. The Court explained:

> This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear * * *. Despite this lack of clarity in the printed record, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Because petitioner cannot overcome the presumption correctness attached to the state court findings that prospective jurors Frazier and Davidson were Witherspoon-excludables, Claim 39 must fail.

In Claim 40, petitioner contends that the prosecutor violated the federal Constitution when he exercised his peremptory challenges as he did -- to remove four prospective jurors who expressed some reservation about the death penalty. This court disagrees.

"[A] prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, so long as that reason is related to his view concerning outcome of the case to be tried." Batson v. Kentucky, 476 U.S. 79, 89 (1986). The only exceptions to this rule are that peremptory challenges may not be used to exclude potential jurors on the basis of race or gender. Ibid (race); Gray v. Mississippi, 481 U.S. at 672 (Powell,

J. concurring) (race); and United States v. DeGross, 960 F.2d 1433, 1438 (9th Cir. 1992) (en bane) (gender).

This court is not aware of any authority which holds that it is unconstitutional to use peremptories to exclude persons with reservations about capital punishment. To the contrary, in Lockhart v. McCree, 476 U.S. at 177, the Court held that:

> 'Withersooon-excludables' or for that matter any group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement.

And in Gray v. Mississippi, 481 U.S. at 671-672 (Powell, J. concurring), Justice Powell wrote separately in part to emphasize that:

> This Court's precedents do not suggest that the Witherspoon line of cases restricts the traditional rights of prosecutors and defense counsel to exercise their peremptory challenges [to remove venirepersons with reservations about capital punishment].

Petitioner therefore is urging the adoption of a new rule. Id. Because no new rules may be announced on collateral review, Teague, 489 U.S. at 288, petitioner's claim must be denied.

For the reasons stated, respondent's motion for summary judgment on Claims 39 and 40 will be granted.

CLAIM 41

Petitioner claims that his sentence is disproportionate to those received by his co-perpetrators who received sentences less than death and contends that this disparity in sentencing is not justified by the record. Respondent submits that proportionality review is not a constitutional right, nor by any means required and cites Pulley v. Harris, 465 U.S. 37, 43-54 (1984). Petitioner claims that Pulley v. Harris is distinguishable because Pulley held that there was no constitutional requirement for inter-case proportionality review. Petitioner here seeks intra-case proportionality review, arguing that his sentence is disproportionate not as compared to sentences received by other defendants who have committed similar crimes, but as to the sentences received by his co-participants in this crime. Memo. in Opp. to Summ. Jdgmt., p. 114, citing Pulley v. Harris, 465 U.S. at 42, n.5. Petitioner argues that the sentences received by his co-participants are directly relevant to petitioner's moral culpability for his crime and, as such, are mitigating evidence which, under Lockett v. Ohio, 438 U.S. at 586, cannot be kept from the sentencer.[20] This court is not persuaded by this argument and even if it were, petitioner cites no authority nor is this court aware of any authority requiring intra-case proportionality review. Consequently, petitioner is arguing for a new rule on

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20. Petitioner also cites Buchanan v. Kentucky, 483 U.S. 402, 418 (1987) where the Court made the undeniable observation that when co-defendants are tried together, a jury can "arrive more reliably at its conclusions regarding the guilt or innocence of a particular defendant and to assign fairly the respective responsibilities of each defendant in the sentencing." Petitioner was tried separately from his co-participants. There is no constitutional requirement that co-participants be tried to-tether. This observation in Buchanan is unavailing.

collateral review and his claim must be denied. Teaque, 489 U.S. at 288. Summary judgment on Claim 41 will be granted.

CLAIM 42

In Claim 42, petitioner advances various facial attacks on the constitutionality of California's capital punishment statutory scheme.

One, petitioner claims that the statutory scheme is unconstitutional per se because it permits the imposition of the death penalty. The Supreme Court rejected this argument in Furman v. Georaia, 408 U.S. 238 (1972), Greqa, 428 U.S. at 227 and Jurek, 408 U.S. at 238.

Two, petitioner argues that the statute is unconstitutional because it fails to distinguish which factors are aggravating and which mitigating. The Ninth Circuit rejected this very argument in Harris v. Pulley, 692 F.2d at 1194, rev'd on other grounds, 465 U.S. 37 (1984).

Three, petitioner contends that the statute is unconstitutional because it permits the absence of mitigating circumstances to be construed as factors in aggravation. The Ninth Circuit rejected a similar challenge to the state of Washington's sentencing statute. See Campbell v. Kincheloe, 829 F.2d at 1458-59.

Four, petitioner submits that the statute is unconstitutional because it fails to exclude nonstatutory aggravating factors from the jury's consideration. The Ninth Circuit rejected this argument in Harris v. Pulley, 692 F.2d at 1193-94, rev'd on other grounds, 465 U.S. 37 (1984).

Five, petitioner maintains the statute is unconstitutional because it failed to require written findings as to aggravating factors supporting the death sentence. The Ninth Circuit rejected this very claim in Harris v. Pulley, 692 F.2d at 1195-1196, rev'd on other grounds, 465 U.S. 37 (1984).

Six, petitioner avers that the statute is unconstitutional because it fails to require jury unanimity on dispositive aggravating factors. This court is not aware of any authority mandating that the jury unanimously agree on any aggravating circumstances it finds true. Consequently, petitioner is arguing for a new rule. Federal habeas courts, absent narrow exceptions inapplicable here, cannot announce new rules of law on collateral review. Teague, 489 U.S. at 288.

Seven and eight, petitioner insists that the statute is unconstitutional because it fails to require that the aggravating factors outweigh the mitigating circumstances Leyond a reasonable doubt and that death be found the appropriate penalty beyond a reasonable doubt. The Ninth Circuit rejected both these arguments in Harris v. Pulley, 692 F.2d at 1194-1195, rev'd on other grounds, 465 U.S. 37 (1984). See also Wade v. Vasquez, 752 F.Supp. at 935 (accord).

Accordingly, for the reasons stated, summary judgment in favor of respondent will be granted as to Claim 42.

CLAIMS 43 - 45

Claims 43, 44 and 45 present various allegations of error committed by the California Supreme Court in affirming petitioner's conviction on appeal. Respondent

contends that these alleged errors are part of the post-conviction process and thus, under the authority of Franzen v. Brinkman, 877 F.2d at 141, are not reviewable on federal habeas. Amended Memo. In Support of Amended Answer, p.141. This court questions Franzen's applicability since the alleged errors occurred on direct appeal, not on collateral review. Nonetheless, the court agrees with respondent that the appellate court's treatment of petitioner's claims does nothinq to alter the merits of the claims themselves. Petitioner asserts that the state court denied him "meaningful appellate review" by applying the wrong legal standard or by applying legal standards in an inconsistent manner. These claims add nothing to the claims of federal constitutional error raised throughout the petition in this case. Petitioner's assignments of error in his trial must stand or fall on their own without resort to how those claims were treated by the state courts. Claims 43, 44 and 45 are not cognizable and respondent's motion for summary judgment on those claims will be granted.

CLAIM 46[21]

Claim 46 asserts that the cumulative effect of constitutional violations rendered petitioner's trial fundamentally unfair. Memo. In Opp. to Summ. Jdgmt., p. 124, citing, inter alia, Lincoln v. Sunn, 807 F.2d at 805.

In Lincoln, the Ninth Circuit declined to find an instructional error so egregious as to constitute a violation of due process but nonetheless noted that the district court "should determine whether this error, in

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21. Originally, petitioner inadvertently numbered this claim as Claim Number 47.

conjunction with the other alleged errors [improper prosecutorial comment and insufficient notice of charged offence], cumulatively deprived [petitioner] of his rights." 807 F.2d at 814, n.6. See also United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988) ("Although each of the above errors [prosecutorial misconduct, Miranda and Jencks Act violations], looked at separately, may not rise to the level of reversible error, their c~mulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted").

The court has yet to discern any constitutional infirmities in petitioner's conviction and sentence. Nevertheless, the court has denied summary judgment on three of petitioner's claims, juror bias and two ineffective assistance of counsel claims (Claims 1, 2 and 3). Because Claims 2 and 3 are inter-related, this court cannot yet determine whether, due to the effect of cumulative errors petitioner's trial was rendered fundamentally unfair. Therefore, respondent's motion for summary judgment on Claim 46 will be denied without prejudice to its renewal at the appropriate time.

III.

For the reasons stated, respondent's motion for summary judgment as to Claims 1, 2, 3 and 46 is DENIED. Respondent's motion for summary judgment as to Claims 4-45, inclusive, is GRANTED. The parties are ORDERED to submit Status Conference statements fourteen days from the date this order is filed.

DATED: September 23, 1992

VAUGHN R. WALKER
United States District Judge

FILED
DECEMBER 12, 1994
RICHARD W. WIEKING
CLERK
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

ALFRED R. DYER,
Petitioner,

v.

ARTHUR CALDERON, in his
capacity as Warden of California
State Prison at San Quentin,
Respondent.

No. C 89-3454 VRW

ORDER DENYING HABEAS RELIEF AND
VACATING STAY OF EXECUTION

DEATH PENALTY CASE

Alfred R. Dyer is a California state prisoner under sentence of death. Dyer was convicted on July 7, 1983, of two counts of first-degree murder with two special circumstances of multiplemurder. (On direct appeal, the California Supreme Court concluded that the jury should have considered only one of the multiple-murder special circumstances. The court found the error harmless, however. See People v Dyer, 45 Cal3d 26, 69

(1988).) He was also convicted of two counts of attempted murder and four counts of kidnapping. For each count the jury found that Dyer was armed with and used a firearm; it found that he intentionally inflicted great bodily injury as an enhancement to six of the eight counts.

Dyer filed a petition for writ of habeas corpus in this court challenging the constitutionality of his conviction and sentence. The court granted summary judgment in favor of respondent on 42 of petitioner's claims in September 1992. At that time, the court ordered an evidentiary hearing on two claims of ineffective assistance of counsel and one claim of juror misconduct. In January 1993, the court granted petitioner's motion for reconsideration of two additional claims of ineffective assistance of counsel and ordered that they be included in the hearing.

The issues on which the evidentiary hearing was granted
were:

1) Ineffective assistance of counsel for failure to conduct an adequate investigation into Dyer's claims that he suffered a head injury in an earlier car accident and that he used drugs at and around the time of the murders;

2) Ineffective assistance of counsel for failure to inform defense experts of relevant facts regarding Dyer's head injury and drug use;

3) Ineffective assistance of counsel for stipulating that Dyer used a firearm during a 1975 robbery;
4) Ineffective assistance of counsel for failure adequately to investigate misconduct on the part of juror Freeland; and

5) Juror misconduct on the part of Ms. Freeland.

A four-day hearing was held in June 1994. Pursuant to the court's order, petitioner presented live testimony from two witnesses: John Burris Dyer's lead trial counsel,[1] and Charles Freeland, the father of the juror who allegedly committed prejudicial misconduct. Petitioner did not obtain service of a subpoena on Jessica Freeland, the juror in question. The court also heard the testimony of Dr. David Smith, who was permitted to testify at the conclusion of the scheduled testimony based on an offer of proof submitted by petitioner. There was a significant gap between petitioner's proffer and the substance of Dr. Smith's testimony.

I

A decade ago, the Supreme Court set forth the now-familiar two-prong standard for analyzing

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1. Robert Cross served as co-counsel before and during petitioner's trial. Although Cross conducted some voir dire (see, e.g., RT 220) and cross-examined one witness (RT 18281990), both Burris and Cross agreed that Burris had ultimate responsibility for the conduct of petitioner's trial. See, e.g., Cross depot at 43, 70; Burris depot at 42. Cross' role was to be prepared in case Burris became unable to continue representing Dyer. RT 55; Cross depot at 43.

ineffective assistance of counsel claims. First, the defendant must show that counsel's performance was deficient. See Strickland v Washington, 466 US 668 687 (1984). Counsel's performance must be evaluated from his perspective at the time, taking into account all the circumstances. Id at 689-90. The defendant must overcome the strong presumption that counsel's challenged conduct falls within "the wide range of reasonable professional assistance." Id at 689. Counsel may fall below the Strickland standard, however, if he fails to "conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." See Sanders v Ratelle, 21 F3d 1446, 1456 (9th Cir 1994); see also Strickland, 466 US at 691.

Second, the defendant must show prejudice from counsel's deficien' performance. He must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a proba~ility sufficient to undermine confidence in the outcome." Strickland, 466 US at 694. The court may consider the cumulative effect of trial counsel's errors. See Wade v £alderon, 29 F3d 1312, 1323 (9th Cir 1994).

The petitioner must prevail on both parts of the Strickland test to obtain relief. Strickland, 466 US at 692-93. The petitioner bears the burden of proof on both parts of the test. Id at 687; Kimmelman v Morrison, 477 US 365, 381 (1986).

With this basic standard in mind, Dyer's four claims of ineffective assistance of counsel are discussed below.

A

Petitioner makes two related claims about Dyer's alleged head injury and his PCP use around the time of the offence. First, he argues that trial counsel was ineffective for failing properly to investigate Dyer's alleged injury and PCP use. Second, he argues that trial counsel was ineffective because he did not adequately inform defense experts about Dyer's head injury and drug use. Had trial counsel investigated and informed his experts of these facts, petitioner contends, the jury would not have found him guilty of capital murder and sentenced him to death.

Respondent contends that trial counsel Burris' investigation into Dyer's alleged head injury was constitutionally adequate. Respondent also contends that Burris attempted to investigate Dyer's unwitting ingestion of PCP on the night of the offence. Because he could not corroborate Dyer's PCP use, respondent maintains, Burris reasonably pursued a defense based on evidence that Dyer had used other drugs. Even if Burris' performance fell below the constitutional standard, petitioner would not be entitled to federal habeas relief, according to respondent, because he could not show prejudice. Respondent argues that petitioner has not come forward with useful evidence that Burris should have uncovered about Dyer's alleged head injury. Furthermore, respondent maintains that petitioner has not presented credible evidence of Dyer's PCP use that Burris should

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Dyer was arrested in March 1981. CT 29.[2] He

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2. The trial and evidentiary hearing transcripts are cited as follows: CT (page) = clerk's transcript at trial; RT (page) = reporter's transcript at trial; EH (page) = June 1994 evidentiary

was charged with two counts of first-degree murder, two counts of attempted murder and four other offences, all of which took place on the night of November 8 and the morning of November 9, 1980.[3] CT 211. Burris was appointed to represent Dyer on March 25, 1981.[4] CT 28.

Burris represented Dyer at his two-day preliminary hearing in June 1981. CT 56, 91. Attempted-murder victims Belinda Murray and Bennie Warren were the main witnesses at the hearing. Murray testified on cross-examination that she and Dyer had drunk wine and injected cocaine on the night of the offence. CT 118-120. Warren testified on cross-examination that Dyer consumed wine but that Warren did not see him use cocaine that night. CT 163, 167. A pathologist testified at the preliminary hearing that both murder victims had evidence of cocaine, amphetamines and methamphetamines in their bodily fluids at the time of their death. CT 69-71.

From the preliminary hearing testimony of the pathologist and of Murray and from Dyer's own accounts, Burris believed that he had substantial evidence that drugs played a part in the offence. This evidence led Burris early in the case to focus on diminished capacity defence. Burris depot at 39. Burris

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hearing transcript. Evidentiary hearing exhibits are designated "Ex. (number)." Depositions prepared for the habeas proceedings are desianated "(name of person deposed) depo. at (page)."

3. This order will develop in detail only those facts relevant to petitioner's pending federal habeas claims. For a more complete version of the facts, see Dyer, 45 Cal3d at 37-44.

4. Carl Morris was initially appointed as Burris' co-counsel. Shortly after Morris was appointed to the municipal court bench, Robert Cross replaced him as co-counsel. Burris depot at 10.

also considered presenting a defense that Dyer was not the one who shot the murder victims. He concluded that this alternative defense would not be as successful in light of the anticipated testimony of Murray and Warren. EH 394.

Shortly after his appointment, Burris sought and obtained funds to hire investigators to prepare Dyer's defense. Burris also requested and obtained a transcript of co-defendant Cleveland Ario's preliminary hearing. Exs. 103, 104. At Burris' request, associates of investigator Samuel Webster located and interviewed Murray and Warren in August and November 1981. Exs. 86-89, 91. Webster's associate interviewed Dyer in November 1981. Ex. 90.

Burris and co-counsel Robert Cross also interviewed Dyer about the events surrounding the offence. Burris' notes from one interview indicate that Dyer told him about PCP ("sherm"), as well as a mixture of cocaine and heroin ("speedballn). Ex. 100. Notes from co-counsel Cross' file, apparently from an interview with Dyer, also indicate "possible PCP usage." Ex. 155. In response to a request by Burris, Dyer prepared a brief summary of his life. The summary referred to a September 1980 auto accident in which Dyer was involved and his car was totalled. Ex. 162.

Dyer also told Burris about Lawrence Price and Delphine Dismuke, with whom he had allegedly consumed alcohol and drugs on the night of the offence. Ex. 100. In August 1982, Webster's firm tried, unsuccessfully, to locate these two potential witnesses. Exs. 99, 101.

By mid-1981, Burris had obtained funds to hire expert witnesses on drug and alcohol abuse. Exs. 103,

104. Burris also requested and received funds for a ballistics expert. He spoke with criminalist Peter Barnett about working on the Dyer case. Ex. 109. Barnett contacted the Oakland police about inspecting physical evidence in the department's possession, but Burris apparently never provided him with a list of the available evidence. Id. Barnett did no further work on the case. Ex. 110.

Burris hired toxicologist/criminologist Kenneth Parker to help him develop an approach to the case. Burris depot at 151. Parker was involved in the Dyer case from late April to late June, 1981. Ex. 106. During that time he conducted a toxicological review of records in the case, interviewed Dyer and consulted with Burris. Id.

Parker provided Burris' office with a list of questions he had relating to the ballistics and toxicological evidence in the case. He recommended that Burris obtain witnesses to verify Dyer's drug and alcohol use and general condition for the two days preceding the offence. Ex. 107. Parker also suggested that Burris ask Dyer what alcohol and drugs he remembered taking and could establish that he took for three days before the offence. Ex. 247. Parker interviewed Dyer for three hours in June 1981. Ex. 268.

From early in his representation of Dyer, Burris also consulted psychologist Thomas Hilliard. Burris received funds in October 1981 to retain Hilliard to help develop evidence for both phases of Dyer's trial. Ex. 105. For the guilt phase, Hilliard was directed to focus on Dyer's mental state around and during the time of the offence. Burris also asked him to identify stress factors appropriate for the jury's consideration at the penalty phase. Ex. G.

Hilliard reviewed police reports, search warrants and parts of the preliminary hearing transcript. He also interviewed Dyer, his mother and two former co-workers. Exs. 93, G. In March and April 1982, Hilliard conducted a psychological evaluation of Dyer, including various tests. Ex. 112. After the tests were completed, Hilliard offered Burris a preliminary assessment of Dyer's mental state at the time of the offence. He suggested that Dyer's conduct resulted from the combination of his personality and background, situational stresses and the alcohol and drugs he had ingested. Ex. 93.

Hilliard asked Burris for further information that he needed to come to a conclusion about Dyer's mental state. In particular, he requested "the results of a toxicological examination as to the impact of the combination of drugs and alcohol on Mr. Dyer cognitively, emotionally, and behaviorally." Ex. 93. Although there is no indication that Hilliard received a written toxicological report, he eventually spoke with Dr. Yago, who conducted a toxicological evaluation of Dyer. Exs. 94, 113; RT 2837. According to Burris, Hilliard ultimately concluded that there was not enough evidence of personality disorder to persuade the jury to return a verdict of less than first-degree murder. EH 52-53, 391. Hilliard recommended Dr. David Smith as the top expert in the Bay Area on the effect of street drugs on behavior. Shortly after Hilliard's recommendation, Burris contacted Dr. Smith. Ex. 114. Burris hoped that Smith would be able to testify about the effect of the drugs on Dyer's thought processes. Burris depot at 155. Smith reviewed toxicology reports for the murder victims and examined Dyer. Exs. 114, 115. According to Burris, Smith told him in July 1982 that he could not help Burris present a diminished capacity defence. Smith did not believe that Burris had

sufficient evidence of drug use to cast doubt on Dyer's mental state. EH 194, 219; Burris depo. at 97.

Smith now has a different recollection of his contact with Burris. He testified at the evidentiary hearing that he conducted a one- or two-hour examination of Dyer. He obtained information about Dyer's personal and family history of substance abuse and ental illness. His examination focused particularly on the time before, during and after the offense. EH 420-21. According to Smith, Dyer said during the interview that he thought he had somehow taken PCP, in addition to cocaine and heroin, on the night of the offense. EH 427-28. Smith also learned about Dyer's history of head injuries. EH 421-22.

Smith concluded that Dyer had a lengthy history of drug abuse and was acutely intoxicated at the time of the crime. He also found substantial neuropsychological impairment that was aggravated by injuries to the head. EH 428-29. He testified at the evidentiary hearing that he met Burris and presented his findings, including possible PCP intoxication. Smith stated that Burris did not seem interested; he did not contact Smith after that meeting. EH 429-32.

Smith stated at the evidentiary hearing that he would have been willing to testify to his findings at Dyer's trial. Smith had, in fact, testified at the prior trial of one of Dyer's codefendants, Michael Jackson. EH 433.

After his meeting with Smith in mid-1982, Burris was concerned about whether he could effectively present a strictly drug-based defense. Burris depo. at 157-58. Relying on the evidence he had, Burris settled on a strategy that combined elements of diminished

capacity, heat of passion and voluntary intoxication. He wanted to show that Dyer's conduct was situational and not premeditated. According to this theory, Dyer's ingestion of drugs and confusion about the loss of his rings on the evening of the offense prevented him from forming the requisite mental state for first-degree murder. EH 391-92. At the same time, Burris was wary of presenting excessive evidence of Dyer's drug use for fear that it would counteract his penalty-phase strategy of showing that Dyer had redeeming qualities. EH 296-97.

In mid-1983, Burris' law clerk, Timothy Bluitt, located the two potential witnesses to Dyer's drug use on the night of the offense that investigator Webster had been unable to find. Bluitt interviewed Lawrence Price, who "aid he did not know anything about the events surrounding the offence. On April 25, 1983, Bluitt spoke with Delphine Dismuke and her brother. According to Bluitt's notes, the Dismukes discussed only Dyer's character; they offered no information about his drug use or the party preceding the offence. Ex. 92.

Pre-trial motions in the Dyer case began on May 9, 1983. Voir dire began on May 12, and the trial started on June 13, 1983.

Three days into the trial, Burris retained Dr. Kate Yago, a drug-abuse specialist, to testify at Dyer's trial. Ex. 116. Based on Dr. Smith's evaluation, Burris had decided not to present expert drug testimony. He hired Yago later, hoping she could educate the jury about the effects of drugs on a person's mental processes. EH 47. Although Burris was not sure that he could tie her testimony to Dyer's conduct, he decided to put Yago on the stand to explain the effect of the drugs. EH 49, 311-13, 392.

Burris provided Yago with medical records for the two attempted-murder victims and coroner's reports for the two murder victims on June 20, 1983. Ex. 117. Yago also interviewed Dyer. EH 309. She testified on June 28 and 29, 1983.

2

Burris' opening statement focused on Dyer's state of mind at the time of the offence. Burris emphasized the use of alcohol, cocaine, heroin and other drugs by Dyer and the four victims. He told the jury that the evidence would show that these drugs affected Dyer's ability to form the required mental state and his character in general at the time of the offence. RT 1607-13.

The prosecution's case consisted primarily of the testimony of the two attempted-murder victims, Belinda Murray and Bennie Warren. They provided the following chronology of events.

Belinda was in her apartment on the evening of November 8, 1980, with her children, her brother Floyd Murray, her friend Nora Fluker and Fluker's children. RT 1614-15. Between 8:00 and 9:00 p.m., Dyer arrived with his brother Michael Jackson and his friend Cleveland Ario. RT 1615. Belinda was friends with all three of the men. Dyer, Jackson and Ario had brought with them an opened bottle of wine from which they had been drinking and some cocaine. RT 1687. Bennie Warren arrived at about 9:30 or 10:00 p.m. RT 1616, 1830.

After Bennie arrived, Dyer, Belinda, Nora, Jackson and Ario went upstairs to inject cocaine. RT 1617-18. They came back downstairs about fifteen minutes later,

and Jackson left to get some wine about a half-hour after that. RT 1834, 1837. He returned with the wine approximately twenty minutes later. RT 1839. They all drank wine. RT 1841. The cocaine and alcohol did not have much of an effect on Belinda. RT 1673-74. Neither Belinda nor Bennie saw or used heroin or amphetamines that night. RT 1673, 1684, 1707.

Dyer, Ario and Jackson left Belinda's apartment. RT 1620. They returned one or two hours later, around midnight, and consumed more cocaine. RT 1621-22. Ario and Jackson again left the apartment. RT 1623. Approximately fifteen minutes later, Bennie also left. RT 1779.

Meanwhile, Dyer lay down on Belinda's bed. He appeared to sleep for about five minutes. RT 1696, 1708. Burris attempted to impeach Belinda on this point with her preliminary examination testimony in co-defendant Ario's case. There she had testified that Dyer lay on the bed for fifteen to twenty minutes. RT 1709. Belinda also stated on re-direct examination that Dyer was not asleep because he responded to questions. RT 1760.

In any event, when Dyer awoke, he asked Belinda who had taken his rings. RT 1624. Belinda said she did not know. Dyer asked her to take a walk with him to look for Bennie, whom Dyer believed had taken his rings. RT 1624. Walking through the projects, Dyer and Belinda met and spoke with Nora's sister- and brother-in-law. RT 1628. Dyer was carrying a .38 revolver that he had brought with him to Belinda's and a .45 automatic that Ario had left with Belinda. RT 1624, 1627.

Dyer and Belinda returned to Belinda's apartment. RT 1628. When Bennie subsequently returned to Belinda's apartment approximately an hour after he had left, Dyer asked Bennie about the rings and then hit him in the head with the guns several 13 times. RT 1630, 1780, 1782. Jackson and Ario returned to Belinda's apartment a few minutes later. RT 1724. Dyer handed Jackson the .38 but kept the .45. RT 1635, 1783.

Jackson, Ario and Dyer forced Belinda, Bennie, Nora Fluker and Floyd Murray out of Belinda's apartment and into a car. RT 1636-37. After they drove for about ten minutes, the car stopped and Belinda, Bennie, Nora and Floyd were ordered out of the car and told to lie down. RT 1641, 1651-52. They lay down in a row on the ground. RT 1653-54, 1805. Guns were fired almost immediately: three shots from the .38 revolver, then three or four from the .45 automatic. Dyer then shot Bennie and Nora Fluker with the automatic. RT 1808-10. Nora and Floyd were killed, and Belinda and Bennie were wounded. RT 1654.

Neither Belinda nor Bennie noticed that the drugs had any effect on Dyer. He was angry and excited about the loss of his rings, but he did not behave unusually. RT 1619, 1628, 1659, 1828, 1985. Dyer seemed in control of himself. RT 1827.

The prosecutor also presented a pathologist, who testified to the gunshot wounds of the murder victims. On crossexamination, the pathologist described the quantity of amphetamines, methamphetamines, heroin and cocaine in the victims' body fluids at the time of their death.

Dyer took the stand as the first witness for the defence. His account was largely consistent with the testimony of Belinda and Bennie. Dyer testified that he had consumed cocaine with Belinda and another friend at Belinda's apartment the night before the offence. RT 2210. The night of the offence, Ario and Jackson had arrived at his house between 6:00 and 7:00 in the evening. Ario had heroin, and Dyer had cocaine. RT 2207. The three men drank some wine and brandy and snorted some cocaine before leaving for Belinda's apartment. RT 2211. Dyer testified that everyone at Belinda's apartment injected a mixture of cocaine and heroin, known as speedball. RT 2215.

When he, Jackson and Ario left Belinda's apartment, they went to the house of a friend, Delphine Dismuke, known as Dee. At Dee's house, Dyer drank gin, smoked "weed" and snorted cocaine. RT 2219-20. Dyer, Jackson and Ario returned to Belinda's after an hour or two. RT 2220. They injected more cocaine or speedballs. Dyer vomited, then passed out on Belinda's bed. RT 2222-23.

After Dyer awoke and returned with Belinda from their walk in the projects, he felt confused. RT 2227. He was hurt and mad, and his head was spinning. RT 2228-29. When they all left Belinda's apartment in the car, Dyer was crying and hearing things but not understanding what was being said. RT 2230. Dyer did not recall what happened after the car stopped. RT 2231.

Dr. Kate Yago, an expert on the mental and physical effects of drug abuse, also testified for the defence. Yago discussed generally the effects of cocaine, heroin, amphetamines, methamphetamines and combinations of these drugs, such as speedballs. RT

2322-31. She also testified that an overload of cocaine and heroin could cause blackouts, confusion, paranoia and periods of aggression and depression. RT 2332-35. Based on what Yago learned during her interview with Dyer, she believed Dyer was under the toxic influence of drugs at the time of the offense. RT 2345-46.

On cross-examination, the prosecutor challenged the basis for Yago's opinion. She agreed that her opinion was based only on information from Dyer and Burris, although the autopsy evidence of drugs that the victims had consumed provided some corroboration. RT 2350, 2386. Yago conceded that Dyer's goal-oriented actions of looking for Bennie and killing the other victims suggested that the drugs had not impaired his mental processes. RT 2360, 2363-64. She also conceded that she could not explain why Dyer had trouble remembering only the events immediately before and during the shooting. RT 2419. Burris did not question Yago further.

Trial counsel also attempted to present one of Dyer's former co-workers as a character witness. RT 2420. When the trial court invalidated a stipulation that would have prevented the prosecutor from impeaching the witness with Dyer's prior convictions, however, Burris asked her no further questions. RT 2438-41. The defense then rested its case. RT 2448.

Both parties' arguments addressed Dyer's mental state at the time of the offences. In his opening and closing arguments, the prosecutor challenged Yago's credibility and the basis for her opinion that Dyer had impaired mental ability. RT 2547-53, 255860, 2587-88. He argued that Dyer's goal-oriented actions before, during and after the offense established premeditation and deliberation. RT 2555-57.

Burris recounted the alcohol and narcotics that Dyer ingested on the night of the offense. RT 2573. He linked the evidence in the case to Dyer's mental state to show that his actions were not goal-oriented and focused. RT 2571-80. Burris referred only briefly to Yago's testimony. RT 2568. The jury returned its verdict of guilty on all eight counts after approximately nine hours of deliberation.

The penalty phase began approximately two weeks later. The state presented no penalty-phase opening statement or witnesses. Its entire case was the trial court's reading of Dyer's three prior felony convictions, to which the parties had stipulated. RT 2716-18.

Burris made an opening statement and put on four penalty-phase witnesses. Psychologist Thomas Hilliard testified about Dyer's mental abilities, developmental history and family background. He described Dyer's low IQ and his frustration with his academic difficulties and with his mother's struggle to support her children. He noted that Dyer developed feelings of isolation from not knowing his father and having his mother move to California when he was young. According to Hilliard, Dyer's use of alcohol, cocaine and heroin both caused and resulted from the stresses in his life. RT 2737-71. On cross-examination, Hilliard stated that his psychological tests of Dyer indicated possible brain dysfunction or perceptional motor difficulties. RT 2782.

Two of his former co-workers then testified about Dyer's pleasant and dependable character. RT 2852-53, 2860-61. Dyer's mother also testified, describing Dyer's childhood in the projects and his academic difficulties. RT 2877, 2882, 2886.

The parties referred only briefly to drugs during their penalty-phase arguments. The prosecutor argued that the statutory factor of mental defect or intoxication "certainly doesn't apply. That is not mitigating." RT 2943. Although he focused on the hardship in Dyer's background, Burris told the jury to consider "the effects, if any that the alcohol and the drugs had on his mental state." RT 2954. The jury sentenced Dyer to death after approximately ten hours of deliberation. RT 2971.

Burris then filed a motion for new trial based in part on "newly discovered evidence" that Robert Fluker, the brother of one of the murder victims, had seen Dyer shortly before the offence. CT 439-43. Burris supported the motion with a declaration from Fluker. The declaration stated that Fluker and his "lady friend" encountered Dyer and Belinda walking through the projects at about 11:30 on the night of the offense. Dyer appeared to Fluker to be "spaced out or pretty loaded." CT 453. Burris argued that Fluker's statement corroborated Dyer's and Yago's testimony that Dyer was seriously affected by the drugs and alcohol he had consumed. CT 442.

In fact, however, this evidence was not newly discovered. Belinda had testified about the encounter with Fluker at Dyer's preliminary hearing. RT 2996; see CT 96. Belinda also testified twice at trial that she and Dyer had met Fluker on their walk through the projects on the night of the offense. RT 1628, 1629. The trial court denied Burris' motion for a new trial. It held that the evidence was not newly discovered and that Burris could have presented Fluker as a witness at trial. RT 3020.

The court also denied Dyer's pro se declaration in support of inadequate counsel, which the court deemed

a motion for a new trial based in part on Burris' failure to investigate Fluker. It held that, based on Fluker's declaration, his testimony would not have been significant. Fluker was not an expert on the effects of drugs, and his encounter with Dyer was not sufficiently close to the time of the offense to be probative. RT 3023.

3

Much of petitioner's questioning at the evidentiary hearing concerned Burris' alleged ineffectiveness for failing to develop evidence of organic brain syndrome. Respondent notes, and the court agrees, that the issue on which the hearing was granted is considerably narrower. See 9/23/92 Order at 29. But see Amended Petition at 37-41. The court will accordingly address only that part of the claim on which the hearing was granted: counsel's alleged ineffectiveness for not adequately investigating the head injury resulting from Dyer's September 1980 car accident.

Dyer told Burris that he had been in a car accident in September 1980, six to eight weeks before the offence. Dyer mentioned that he had hit his head in the accident and gone to the hospital. EH 116; Burris depo at 128.

Burris testified that his then-fiancee, a surgical resident at the time, reviewed Dyer's skull x-ray from the hospital. She told Burris that the x-ray did not indicate structural damage; she did not say anything about possible neurological or neuropsychological impairment. She did not examine Dyer or talk with any of his doctors. EH 120; Burris depo. at 128-31. Finding no abnormality in the skull x-ray, Burris conducted no

further investigation into possible brain damage or mental defect. Burris depo. at 128-29.

Hilliard, however, was aware that Dyer had been in a car accident. He testified during the penalty phase that the financial impact of having his car "totaled" contributed to Dyer's stress around the time of the offence. RT 2770. There is no indication that Hilliard knew that Dyer had hit his head during the accident, although Burris' fiancee may have spoken to Hilliard about the skull x-ray she reviewed.[5] Burris depo. at 132.

Petitioner alleges that trial counsel was ineffective for failing adequately to investigate Dyer's head injury and for failing to inform defense experts about the injury. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 US at 691; see also Sanders, 21 F3d at 1456. The facts known to tne attorney determine the scope of the duty to investigate. See Ames v Endell, 856 F2d 1441, 1444 (9th Cir 1988).

Attorneys may be found constitutionally ineffective when they are aware of a defendant's mental illness yet conduct no investigation. See, e.g., Deutscher v Whitley, 884 F2d 1152, 1159-61 (9th Cir 1989) (attorney knew of hospitalization for mental illness but did not discover or present diagnoses of schizophrenia and organic brain damage) vac'd on other grounds as Anaelone v Deutscher, 500 US 901 (1991); Brewer v Aiken, 935 F2d 850, 853-58 (7th Cir 1991) (attorney knew of defendant's borderline intelligence and compliant

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5. Hilliard died before Dyer's federal habeas petition was filed in 1989. Ex. 7.

personality but did not discover that he had had shock therapy and brain damage); Cunninaham v Zant, 928 F2d 1006, 1016-19 (llth Cir 1991) (attorney knew defendant had plates implanted in his head but did not discover that he was mentally retarded).

Attorneys whose inadequate investigation caused them to miss readily available evidence of their clients' mental illness have also been found ineffective. See, e.g., Evans v Lewis, 855 F2d 631, 636-37 (9th Cir 1988) (suicide attempts and incarceration in mental institutions); Lovd v Whitlev, 977 F2d 149, 159-160 (5th Cir 1992) (evidence of defendant's insanity); Kenley v Armontrout, 937 F2d 1298, 1305-07 (8th Cir 1991) (abnormal EEGs, suicide attempts and treatment for seizure disorder); Blanco v Sinaletarv, 943 F2d 1477, 1501-05 (llth Cir 1991) (epilepsy and organic brain damage); StePhens v Kemn, 846 F2d 642, 652-53 (llth Cir 1988) (institutionalization four to six months before trial).

A petitioner establishes prejudice by showing that the attorney's failure to conduct an adequate investigation prevented the jury from learning about substantial relevant evidence. See, e.g., Deutscher, 884 F2d at 1161; Loyd, 977 F2d at 160; Blanco, 943 F2d at 1505; Brewer, 935 F2d at 858; Cunninaham, 928 F2d at 1019; Profitt v Waldron, 831 F2d 1245, 1249-50 (5th Cir 1987); Armstronq v Dugger, 833 F2d 1430, 1433-34 (llth Cir 1987).

In the present case, by contrast, it is undisputed that trial counsel conducted some investigation into Dyer's car accident, head injury and mental status. EH 118, Burris depo. at 128-30. Burris had his fiancee review Dyer's head x-rays; she saw no abnormality. Dr. Yago performed a psychiatric evaluation of Dyer.

There is no indication that she observed signs of brain damage during her psychiatric evaluation of Dyer. RT 2346, 2387; Ex. 94. Burris also had Hilliard examine Dyer and testify at the penalty phase about the results of several psychological tests he administered.[6] RT 2750-68.

Furthermore, there is no indication that Burris missed readily available evidence of brain damage or mental illness. Petitioner has presented the police report from the accident. The investigating officer noted that Dyer had a cut on his head. But he refused an ambulance. Ex. 241. Dyer seemed less active that usual after the accident, apparently because he was upset that his car had been destroyed. Gantt depo. at 13-14. Petitioner has tried to locate Dyer's hospital record from the evening of the car accident. The skull x-rays that Burris said that he examined were not in his file for the case. EH 270. The hospital indicated that Dyer was seen in the emergency room that eveninq but that its records had been destroyed. Ex. 36. Petitioner's attempts to find the doctor who examined Dyer have been unavailing. Ex. 10. Prison health and criminal justice mental health records produced by petitioner do not reveal significant signs of mental defect or mental illness. Exs. 216, 217, 218, 221.

Petitioner has not come forward with substantial, credible evidence that Burris would or should have found had he properly investigated. The court thus rejects his claim that trial counsel did not conduct a

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6. Hilliard testified that Dyer's behavior had changed around the time of the accident. He attributed this change not to a head injury, however, but to financial stress resulting from the destruction of Dyer's car and a decrease in his hourly wage. RT 2943 - 44.

constitutionally adequate investigation of the car accident and resulting injury.

Because petitioner has not come forward with sound evidence of injury resulting from the accident, he cannot show that he suffered prejudice at the guilt phase. It is true that Dr. Yago stated in a declaration that a head injury, depending on its nature and extent, might have increased the effects of the drugs Dyer had ingested on the night of the offence. Ex. 4. Evidence of a head injury might have helped Dr. Yago explain Dyer's inability to remember the murders. See, e.g., RT 2383-86, 2417. Such evidence would have done little, however, to support her testimony against the prosecutor's persuasive cross-examination designed to show that Dyer's actions indicated that he could form the requisite intent. See, e.g., RT 2360-67.

Given the evidence introduced against Dyer at the guilt phase -- as well as the evidence of intoxication introduced on his behalf -- the court concludes that it is not reasonably probable that the jury would have returned a different verdict had it heard about Dyer's head injury. Petitioner's claim that he was prejudiced by trial counsel's failure to inform Dr. Yago about his head injury fails for the same reason.

Nor has petitioner produced substantial, relevant penaltyphase evidence that the jury was prevented from hearing. Hilliard told the jury that Dyer was borderline retarded and that an IQ test placed him in the lowest ten percent of people tested. RT 2758. He testified that Dyer had possible brain dysfunction and perceptional motor difficulties. RT 2782. The prosecutor argued that neither intoxication nor mental defect was present to mitigate the offence. RT 2943. Although Burris did not explicitly connect Hilliard's

testimony with the mental-defect statutory mitigating factor, he did argue generally that the jury should consider Dyer's low IQ. RT 2957-58.

The court on this record cannot conclude that there is a reasonable probability that this undiscovered evidence would have affected the penalty-phase outcome. See Strickland, 466 US at 694. Dyer was not prejudiced by any deficiency in Burris' investigation of his head injury. For the same reason, petitioner's claim that Burris was ineffective for not informing Hilliard about the injury cannot overcome the prejudice hurdle of Strickland.[7]

B

1

It is undisputed that Burris had some indication that evidence of PCP use might be relevant to Dyer's defence. See, e.g., Ex. 100; EH 164, 147, 305; Burris depot at 11, 82. It is also undisputed that Burris presented no PCP evidence at either the guilt or the penalty phase. Had he had evidence that Dyer had

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7. It is true, as petitioner contends, that Hilliard asked trial counsel for records he needed to complete his psychological evaluation. He requested Dyer's juvenile and prior criminal history records and a toxicological evaluation assessing the extent and impact of Dyer's drug use just prior to the offense. Ex. 93. As of September 1982, Hilliard had not received the toxicolcgical evaluation. Ex. 113.

Hilliard did, however, speak with Dr. Yago, who conducted such an evaluation, immediately before he testified. Ex. 94. He testified that Dr. Yago's conclusions contributed to his own opinion about Dyer's sense of morality. RT 2836-37. There is no indication that Hilliard believed that Dyer had brain damage or told trial counsel that he needed additional information to determine whether brain damage was present. EH 104-07, 330.

used PCP on the night of the offence, Burris testified, he would have decided whether to present that evidence. See, e.g., EH 206, 213; Burris depo. at 92. Burris believed, however, that he had no credible or corroborated evidence to support a PCP theory. See, e.g., EH 163-64, 309-10; Burris depo. at 92, 103, 109.

Burris' notes from a conversation with Dyer reflect a discussion of PCP smoked in the form of "sherm." Ex. 100. It is not clear exactly what Dyer told Burris about sherm. At his deposition, Burris stated that Dyer had told him that he had smoked sherm at Dee's house on the night of the offence. Burris depo. at 11, 82. Burris said he prepared for trial with the assumption that Dyer had used PCP. Id at 89. At the evidentiary hearing, however, Burris testified that he never walked away from any meeting with Dyer with the feeling that Dyer had used PCP. EH 305. Burris testified that Dyer had told him that other people were smoking sherm at Dee's party that night. EH 164.

Burris tried to locate Dee, whose real name is Delphine Dismuke. In early August 1982, he provided an investigator with her address and phone number. Counsel told the investigator that Dyer had "consumed alcohol and smoked marijuana or dope at [Dee's] home." Ex. 99. Burris did not mention specifically that Dyer had said he smoked sherm or PCP. By referring to "marijuana or dope," however, Burris intended for the investigator to ask Dee about any drug that Dyer had smoked. Burris depo. at 90.

The investigator later told Burris that the address and phone number were for Dee's mother. Her mother told the investigator that Dee lived on B Street in Oakland and had no telephone. Although the

investigator asked Dee's mother to have her call him, Dee did not call. Ex. 101.

Burris' law clerk, Timothy Bluitt, found Dee in April 1983, approximately three weeks before jury selection began. Ex. 92. Burris had told Bluitt to look for witnesses; he does not recall directing him to investigate PCP. EH 169. Bluitt's interview notes state that Dee had known both Dyer and Belinda since 1966. Dee said also that Dyer was popular, quiet and non-violent. The interview notes do not reveal whether Bluitt asked Dee about the party at her house on the night of the offence. Ex. 92. Bluitt also spoke with Dee's brother, who stated that he would not be willing to testify on Dyer's behalf. Ex. 92.

Burris reviewed the interview notes and decided not to attempt to interview Dee further. Based on the notes, he concluded that he would not put Dee on the stand. Burris testified that he had several concerns about presenting her 26 testimony. First, he doubted that Dee would be a credible witness, given both her long-standing friendship with Dyer and her use of illegal drugs. EH 174, 176. Second, he believed that her testimony would both contradict other evidence introduced at trial and open the door to harmful testimony about Dyer's background. EH 174, 180. Finally, Burris did not want to overwhelm the jury with testimony about Dyer's drug use. EH 211. Burris believed he already had a lot of evidence about the intoxicants Dyer had ingested on the night of the offence. EH 212-13; Burris depo. at 91.

Burris also noted that any PCP evidence that existed might not be particularly probative since, at best, it would have shown that Dyer smoked the drug several hours before the offence. Burris depot at 89-91. Burris

concentrated instead on developing and presenting evidence of "speedballs" that Dyer injected at Belinda's house. Id at 109. Burris did not attempt to locate or speak with any other potential witnesses from Dee's party. EH 187.

Petitioner has come forward with depositions from three witnesses who say they saw Dyer smoke sherm at Dee's party the night of the offence. Charles Howard depo. at 14, Sandra Collins depo. at 15, Roger Dismuke depo. at 13. All three witnesses also smoked sherm at the time. Howard depo. at 14, Collins depo. at 14, Dismuke depo. at 13. Dismuke testified that Dyer became uncharacteristically aggressive and his eyes grew big after he had the PCP. Dismuke depo. at 13-15, 39. Howard and Collins, on the other hand, noticed nothing unusual about Dyer's behavior or 27 appearance. Howard depo. at 15, 30; Collins depo. at 29.

The three witnesses do not agree about whether Dyer knew that he was smoking sherm that night. Howard depo. at 29-30 (Dyer knew); Collins depo. at 23 (Dyer knew); Dismuke depo. at 12, 56, 67-68 (Dyer did not know); "ee also Ex. 33 (Quinney declaration stating that Dyer did not knowingly smoke PCP but was told after the fact). They also disagree about whether sherm has a distinctive smell that would alert a smoker as to what he was smoking. Howard depo. at 14 (smell); Collins depo. at 23-24 (smell); Dismuke depo. at 31 (nothing distinctive). They agree, however, that Dyer did not usually use PCP. Howard depo. at 29; Collins depo. at 16; Dismuke depo. at 24, 40. Dismuke also stated that he did not know that Dyer used cocaine. Dismuke depo. at 14, 24.

Howard and Collins stated that they had not been contacted by anyone on Dyer's behalf at the time of the

trial. Howard depo. at 16-17; Collins depo. at 17-18. Howard had, in fact, been contacted by Burris' law clerk some time before the trial. According to Bluitt's notes, Howard told him only that Bennie Warren was being forced by the police to testify against Dyer. Howard also agreed to keep Burris' office informed of anything he learned that could help Dyer. Ex. 92. They would have been willing to testify had they been contacted. Howard depo. at 16-17; Collins depo. at 17-18. Roger Dismuke was less certain about whether he would have testified at Dyer's trial that he and Dyer had smoked PCP. Dismuke depo. at 15-16, 49, 59, 61-62. When he was contacted by Bluitt, Dismuke said he would do anything he could to help Dyer except testify at his trial. Ex. 92.

Neither Collins nor Dismuke knew about Dyer's prior convictions, although Howard did. Dismuke depo. at 25-26; Collins depo. at 33; Howard depo. at 24. Collins was fifteen years old at the time of the offense. Collins depo. at 12. Dismuke might have been on probation at the time of the offense, and Howard had a 1975 felony conviction for assault with a deadly weapon. Dismuke depo. at 62; Howard depo. at 17-18.

Petitioner has also introduced a deposition from Robert Fluker, the brother-in-law of murder victim Nora Fluker. His deposition is consistent with his declaration filed in support of Dyer's motion for a new trial. See CT 453. Fluker testified that he and Carol Tiexiera, a friend, saw Dyer and Belinda the night of the offense. Fluker depo. at 8. Although the weather was cold, Dyer was not wearing a coat. Id at 10. Dyer's clothes were unusually messy, his eyes were big and his movements were slow. Id at 11. Because Dyer's appearance and behavior were unusual, Fluker assumed he was on PCP. Id at 12.

Fluker spoke with Burris in connection with the declaration he executed. Id at 37-38. Although he told Burris that Dyer seemed spaced out on the night of the offense, he did not specifically mention sherm or PCP. Id at 39. Fluker had a 1982 felony conviction for drug possession and was in jail at the time of Dyer's trial. Id at 12, 19. He would have tried to avoid testifying on Dyer's behalf. Id at 13-14. Fluker knew that Dyer had used cocaine and heroin, but he did not know about Dyer's prior convictions. Id at 28.

Petitioner claims that the trial transcripts of Dyer's codefendants, Michael Jackson and Cleveland Ario, also corroborate his PCP use. Both trials took place in 1982, at least five months before Dyer's trial began. Exs. 166, 167. Jackson and Ario were both convicted, and both men apparently appealed their convictions. EH 155. Burris testified that he never interviewed either co-defendant or considered having them testify at Dyer's trial. EH 314-15. Both co-defendants were represented by counsel, whom Burris believed would not allow them to testify for Dyer. EH 155.

Ario and Jackson each testified at his own trial. Ario testified about Dyer's use of cocaine and heroin speedballs at Belinda Murray's house. Ex. 167 at 4, 9. He also testified that Dyer was shaking, sweating and "tripping" -- he could not handle himself and was acting strange. Id at 10-11, 53-55, 57-58, 83.

Jackson's testimony about Dyer's ingestion of and apparent reaction to drugs was virtually identical to Ario's account. Ex. 166 at 441, 443, 451, 457. In addition, he claimed that Dyer was in a "trance" and that he had never seen Dyer appear the way he did that night. Id at 460, 467, 474, 488. Jackson also testified

that he smoked sherm at Dee's party with her brother. Id at 449.

Burris requested and received portions of Ario's trial transcript in April 1982. CT 248-49. Burris does not recall reviewing the transcript, but he assumes that he would have read the testimony of Belinda Murray and Bennie Warren. EH 368. Burris' trial file included notes from a law clerk's review of portions of the Ario transcript. Ex. 160. Burris has no recollection of requesting or reviewing a transcript of Jackson's trial. EH 368, 388. Burris does not recall any mention of PCP in the transcript" he reviewed. EH 318.

Burris does not recall mentioning PCP to any of his experts or consultants. EH 167, 220, 224; Exs. 4, 31. Parker, Hilliard, Smith and Yago each interviewed Dyer, but none of the experts suggested to Burris that Dyer had used PCP.[8] Nor does Burris recall any indication of PCP use in any documents he reviewed for the case, including the victims' autopsy reports or the transcripts he had of the trial of Dyer's co-defendants. EH 318.

Dr. Smith contradicted Burris' account. Smith testified that Dyer had told him that he thought he had unwittingly smoked PCP on the night of the offense. Smith recalled that he had mentioned PCP to Burris. EH 430. Evidence that Dyer had used PCP was significant, according to Smith, because it could explain Dyer's memory loss as well as his violent overreaction to the disappearance of his rings.[9] Smith testified that

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8. Parker asked Dyer specifically about the drugs he ingested the night of the offense. Dyer mentioned alcohol, marijuana, cocaine and heroin, but not PCP. Ex. 31.

9. Parker agrees that evidence of PCP use could have been

Dyer's blackout on the evening of the offense was consistent with his having used-PCP. EH 431-32. Used by someone with a prior head injury, PCP could cause increased neuropsychological impairments. EH 432.

2

Petitioner claims that trial counsel was ineffective for failing properly to investigate the possibility that he had used PCP on the night of the offense. Trial counsel may be found ineffective if he neither "conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so." Sanders, 21 F3d at 1456; see also Strickland, 466 US at 691.

The court cannot conclude that Burris' performance at the guilt phase was constitutionally ineffective. Burris was at least aware that PCP was used at Dee's party. He directed an investigator and a law clerk to find Dee and she was located. Burris testified that he did not investigate Dee further because he had made a decision, after reviewing the notes from his law clerk's interview, not to call her as a witness because she would not be credible for the reasons supra. Burris also requested transcripts from the trial of one of Dyer's co-defendants. He did not attempt to interview Ario or Jackson or call them to testify because he did not believe their counsel would permit them to testify with their appeals pending, a quite reasonable assumption.

Even if the court were to conclude that Burris' investigation had been deficient, there would have been no prejudice to Dyer. Burris presented some evidence

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particularly relevant to explain Dyer's paranoia and unusual behavior Ex 31.

that Dyer was intoxicated. For example, he elicited testimony from Belinda and Dyer that Dyer had used alcohol, marijuana, cocaine and possibly heroin in the hours immediately preceding the murder. See, e.g., RT 1617-19, 1622, 1694, 2207, 2215-23. Belinda corroborated only Dyer's ingestion of wine and cocaine. She denied that he used any heroin, and she was not present when he allegedly smoked marijuana or PCP at Dee's house. RT 1673, 1684. The autopsy report from the murder victims corroborated Dyer's testimony in this regard. RT 2162-67, 2174. Dr. Yago testified about the toxic effects of the combination of drugs.

Balanced against this account of Dyer's intoxication was the testimony of the two attempted-murder victims. Belinda Murray and Bennie Warren testified that Dyer's behavior did not seem unusual. RT 1628, 1659, 1771, 1855-56, 1985. Bennie stated that he saw Dyer shoot Nora Fluker two or three times, from a distance of two feet, with an automatic weapon. RT 1808-09.

Considering the testimony at trial and petitioner's new evidence, the court finds that there is not a reasonable probability that the guilt-phase verdict would have been different had counsel found and presented the PCP evidence. See Strickland, 466 US at 694; see also United States v Palomba, 31 F3d 1456, 1461 (9th Cir 1994) (prejudice analysis must also consider whether the error rendered the trial fundamentally unfair or unreliable). Of the four witnesses who say they saw Dyer smoke sherm, only two -- Sandra Collins and Charles Howard -- stated unequivocally that they would have testified at his trial. Their testimony would have contradicted Dyer's own testimony, according to his declaration, that he did not smell PCP in the cigarette he smoked at Dee's house. Collins and Howard also stated that Dyer appeared unaffected by the drug.

Their testimony thus would have supported the prosecutor's argument that Dyer was in control of himself and not suffering from diminished mental capacity at the time of the offense. Moreover, had Burris investigated Collins and Howard, he might reasonably have decided not to put them on the stand. They might have been subject to cross-examination about Dyer's prior felonies, which Burris wanted to keep from the jury during the guilt phase. See United States v Harden, 846 F2d 1229, 1231-32 (9th Cir 1988).

Evidence that Dyer was under the influence of PCP might have helped Dr. Yago explain Dyer's memory loss. On the other hand, it would have offered her little support against the prosecutor's convincing cross-examination. The evidence would not have blunted his argument that Dyer's goal-oriented actions demonstrated that his mental processes were not impaired. For the same reason, the court concludes that Dyer was not prejudiced by Burris' failure to inform his guilt-phase experts of the possibility that Dyer ingested PCP on the night of the offense.

The court also concludes that Dyer was not denied a reliable sentence because of Burris' failure to investigate PCP use and present the evidence to his experts. The record supports Burris evidentiary-hearing testimony that he chose to present a positive portrait of Dyer at the penalty phase. EH 230, 298. Hilliard, Dyer's mother and his co-workers testified that Dyer had worked to overcome hardship and was basically a decent person. The jury had rejected a drug-based defense at the guilt phase; Burris made a reasonable strategic decision not to focus on drugs at the penalty phase. Cf. Mak v. Blodgett, 970 F2d 614, 617, 619 (9th Cir 1992) (prejudice found when attorney failed to present any humanizing evidence at the penalty phase).

It is true that evidence of PCP would have been relevant to a statutory mitigating factor. See Cal Penal Code § 190.3(h) (impaired capacity due to intoxication); RT 2924. The court notes, however, that the jury heard considerable evidence at the guilt phase about Dyer's drug and alcohol consumption on the night of the offense. Burris urged the jury to consider the effects of these intoxicants as a factor in mitigation. RT 2954. Based on the record in this case, the court concludes that the absence of PCP evidence did not render Dyer's sentencing hearing unfair or unreliable. Cf Evans v Lewis, 855 F2d 631, 636-37 (9th Cir 1988) (prejudice found when attorney did not present any mitigation despite available evidence of the defendant's mental illness). There is not a reasonable likelihood that the jury would have voted for a verdict other than death had Burris presented evidence that Dyer had used PCP. See Strickland, 466 US at 695.

C

Petitioner contends that Burris was ineffective for failing to consider the possibility that his penalty-phase stipulation to a firearm enhancement could be used as evidence in aggravation that Dyer had been convicted of a crime involving violence. He argues that Burris' stipulation was not a reasonable tactical decision. Rather, according to petitioner, Burris' performance was constitutionally deficient because he failed completely to realize that his choice would affect the jury's sentencing calculus.

Petitioner argues that he was prejudiced because the stipulation deprived him of an opportunity to present evidence to the jury that he did not use a firearm during the robbery. The robbery conviction was the only evidence presented to support the statutory

aggravating circumstance of prior violent criminal activity. RT 2925; see also Cal Penal Code § 190.3(b). Had counsel not stipulated to the firearm enhancement, petitioner contends, the jury might not have found that aggravating factor.

Respondent argues that Burris' decision was reasonable. By stipulating to the robbery, he prevented the prosecution from calling the victim to testify at the penalty phase. Dyer was not prejudiced by the stipulation, respondent contends, because the prosecution easily could have proved either that Dyer personally used a firearm during the robbery or that he was vicariously liable for the use of the firearm.

1

Just before his trial started, Dyer admitted that he had been convicted of three prior felonies: a 1975 robbery, a 1973 burglary and a 1972 burglary. RT 1584-85. The prosecutor later agreed that he would not use these prior convictions during the guilt phase to impeach Dyer or any character witnesses. RT 220203.

At the penalty phase, Burris stipulated to the prior felony convictions. RT 2646. The prosecutor then stated that he would present a witness to testify to Dyer's threats and use of a gun during the 1975 robbery. Id. Over Burris' objection, the court stated that it would allow the testimony. RT 2647.

The prosecutor later decided not to introduce the witness to the robbery. RT 2655-56. Instead, he asked the court to take judicial notice of the fact that Dyer was convicted of robbery with an arming clause. RT 2656. The prosecutor stated -- and Burris agreed -- that the armed robbery conviction could be used in

aggravation as both a prior felony conviction and to show "that he was in the company of someone who was using implied threat of force or violence." Id. Just before the penalty phase began, the trial court told counsel that he would instruct the jury on Dyer's prior convictions, based on their stipulation. RT 2711-12.

The jury was instructed that Dyer had been convicted of two other prior convictions and of armed robbery with use of a firearm. RT 2718. The prosecutor did not make an opening statement or present any other evidence at the penalty phase. After the defense completed its penalty-phase case and before closing statements, Burris stated for the record that he had not intended to stipulate to Dyer's use of a firearm as evidence of violence. RT 2900.

The prosecution referred to the armed robbery conviction during argument to illustrate Dyer's pattern of increasing violence and to apply the aggravating factors of prior convictions and violent criminal activity. RT 2939, 2942. Burris argued in response that the armed robbery conviction did not mean that Dyer had caused physical harm. RT 2956.

In a motion for mistrial filed after the jury sentenced Dyer to death, Burris argued that he stipulated to the conviction but not to the weapon-use enhancement. RT 3004. He argued that the prosecution should have been required to prove that Dyer had in fact used a weapon during the robbery. RT 3005. The court denied the new-trial motion, stating that judicial notice was proper based on the authenticated documents of Dyer's robbery conviction and the prior jury's finding that he had personally used a firearm. RT 3021.

Burris testified that he did not recall what Dyer had told him about the 1975 armed robbery but that he remembered some dispute about who had held the gun during the offense. He did not recall investigating the 1975 offense. EH 255; Burris depo. at 140. But Burris' files included a copy of the trial transcript and the appellate opinion for the 1975 robbery. A bill from Burris' investigator indicates that he contacted the arresting officer in the case. He said he made a tactical decision to admit the prior convictions during the guilt phase so they would not be introduced into evidence.

Thinking there was a good chance for a conviction of less than first-degree murder, Burris said, he did not consider the ramifications of the stipulation for the penalty phase. EH 25758. On the other hand, he testified that he had a strategic reason for adhering to the stipulation during the sentencing proceeding. His penalty-phase strategy was to present Dyer as a decent person. Burris testified that he would have undercut that strategy had he introduced the victim to testify that Dyer had not used a weapon during the robbery. EH 339-40. Burris also recalled that he was uncomfortable with Dyer later claiming that he did not use a weapon after he had pled guilty to the use clause. Burris depo. at 139-40, 142. As petitioner points out, however, Dyer did not plead guilty; he was convicted at a trial.

Theodore Wright, Dyer's co-defendant in the 1975 robbery, testified in a deposition that Dyer never held the gun during the robbery. He stated that Dyer had not planned the robbery and was surprised when Wright pulled out the weapon. Wright also testified that he was in prison for another armed robbery at the time of

Dyer's trial. Wright has never told the police or testified before that Dyer was not responsible for the robbery. Petitioner also presents a declaration from the robbery victim stating that he was not sure which of the co-defendants had the gun. Ex. 25. Respondent objects to the declaration as hearsay and irrelevant. The court concludes that the declaration is relevant to petitioner's claim that he was prejudiced by trial counsel's stipulation to the prior conviction. The court will admit the declaration not for the truth of its contents but to show that the victim would have testified accordingly had he been called as a witness.

3

A attorney's erroneous stipulation to his client's prior convictions during a capital sentencing proceeding may constitute ineffective assistance of counsel. See, e.g., Lewis v Lane, 832 F2d 1446, 1458 (7th Cir 1987). In the sentencing phase, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 US at 695. Petitioner's claim fails because he has not shown prejudice.[10]

This is not a case in which trial counsel's error caused the jury to hear sentencing information that was conclusively established to be inaccurate and false. See Lewis, 832 F2d at 1456 (without determining whether prosecutor had certified copies of alleged convictions, counsel stipulated to four prior felony convictions, two of which did not exist). Dyer does not dispute that

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10. Because Dyer has not shown that he was prejudiced by the stipulation, the court need not address whether Burris' conduct was deficient.

evidence of his conviction was properly before the jury. The error Dyer alleges is Burris' stipulation that a jury found that he used a weapon during the 1975 armed robbery. Had Burris not so stipulated, the jury still would have been instructed that Dyer had been convicted of armed robbery. Furthermore, if Burris had not stipulated to the weapon use, it is clear from the record that the prosecutor would have presented the robbery victim to testify to Dyer's gun use. See RT 2646-47. Respondent also notes that the trial court could have taken judicial notice of the file and instructed the jury that Dyer used a weapon during the robbery. See Dyer, 45 Cal3d at 75.

Dyer argues that Burris -- had he properly investigated the prior conviction -- could have presented evidence that Dyer did not use a weapon during the robbery. It is unlikely that this evidence would have made a difference in the capital jury's sentencing verdict or even as to the existence of the prior-violent-crime aggravating factor. During Dyer's robbery trial, the victim was impeached with his prior testimony identifying the co-defendant as the one who was armed. That jury nonetheless found that Dyer had personally used a firearm. Furthermore, Dyer's co-defendant would not likely have been a very credible witness had he been called to testify that Dyer did not carry or know about the gun. Wright was in prison at the time and had not previously come forward with this exculpatory information. Wright depo.

The court recognizes that Dyer's conviction for the armed robbery with the use clause was the only evidence offered to support the statutory aggravating factor of prior violent criminal activity. Without Burris' stipulation to the conviction, it is conceivable that the jury would not have found beyond a reasonable doubt that Dyer used or threatened force or violence during

the armed robbery. If the jury had not counted that statutory aggravating factor, it is conceivable that it would have sentenced Dyer to life without parole. On the facts of this case, however, these possibilities do not add up to a reasonable probability that the jury's sentence would have been different had Burris not stipulated to Dyer's prior conviction for armed robbery.

D

Dyer claims that trial counsel was ineffective for failing adequately to investigate allegations of misconduct by juror Freeland. He argues that Freeland would have been excused from the jury had Burris discovered the allegedly prejudicial information that she did not reveal during voir dire. Burris' failure thus prejudiced him, Dyer argues, by permitting a biased juror to serve on his case.

Respondent contends that Burris conducted a prompt and thorough investigation once he had reason to believe that Freeland had withheld information during voir dire. According to respondent, the information Dyer alleges that Burris should have found does not establish that Freeland was a biased juror. Therefore, respondent argues, Dyer cannot show prejudice from Burris' alleaed errors.

1

The voir dire for Dyer's trial was conducted in two stages. First, prospective jurors were questioned individually in camera about their attitudes toward the death penalty. Venire members who were not excused for cause during the first stage then answered general voir dire questions in open court, with all other prospective jury members present. At this second stage,

each prospective juror offered background information about her employment, residence and family. Each prospective juror then responded "yes" or "no" to a printed series of questions about relevant experience with criminal proceedings, prior jury service and contact with law enforcement personnel.

During the first stage of voir dire, juror Freeland stated that her name was "really * * * Mrs. Provost, but I'm separated so I just go by my maiden name." RT 780. Freeland was the last juror questioned during the general voir dire. She was present when all the previous prospective jurors responded to questions about crimes committed by and against them, their property and their family members.[11] Freeland stated during general voir dire that she was separated and that she had served as a juror on two civil cases. RT 1546-47. She responded "no" to questions about whether she or any of her relatives or close friends had been victims of "any type of crime" or "accused of any offense other than traffic cases." RT 1546-47; see also RT 1164 (jury questionnaire).

Freeland was initially seated as the last alternate juror. Near the end of the prosecution case, Freeland was randomly chosen to replace a juror who had been excused. RT 2006.

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11. See, e.g., RT 1334-35 (home broken into); 1410 (mother mugged, cousin tried for murder); 1430-32 (mother tried on drug charges and for murder); 1434 (brother's apartment broken into); 1436 (sister in federal prison); 1485-87 (uncle in prison for out-of-state murder fifteen years ago); 1526 (grandmother mugged, brother-in-law arrested for drug offenses); 1532 (parents' home broken into twice); 1537 (brother accused of crime).

After the jury returned its guilt-phase verdict, Burris told the trial court that Freeland's brother Richard had been killed five to ten years earlier. Burris said he had just learned about the killing from Dyer, who had been told by Freeland's husband, Melvin Provost. Provost, Burris said, was in the courthouse jail with Dyer. Provost had told Dyer that Freeland "had expressed strong views about "Richard's drug-related death] and the circumstances surrounding it." RT 2693.

Burris told the trial court that Freeland had not mentioned her brother's death during voir dire. RT 2693-94. He asked the trial court to order Provost brought in from Santa Rita jail for questioning about the death. The trial court declined to subpoena Provost at that time and instead directed Burris to gather additional information. RT 2695.

Co-counsel Cross interviewed Provost at Santa Rita. Provost told Cross that Richard had been killed approximately four years ago but he did not know whether the killing was a criminal act or justifiable homicide. Provost was not sure whether Richard's killer was charged or tried. RT 2705.

The prosecutor then recalled that he had handled the case against Richard Freeland's killer. The defendant pled to manslaughter. RT 2706. The prosecutor provided the trial court with the file in that case. RT 2707.

The trial court called juror Freeland into chambers. She admitted that her brother had been killed approximately five years earlier. RT 2708. She said she did not know whether any legal proceedings were instituted against "the man that accidentally shot him." Freeland told the trial court that she answered "no" to

the question whether any family member had been the victim of a crime because she believed her brother's death was an accident and not a crime. She stated that she could be fair in Dyer's case. RT 2709.

Burris then asked Freeland whether she or her family had any contact with the police or the District Attorney's Office. Freeland said they had not. In response to a question by Burris, she also stated that none of her family had testified in court. RT 2710. The trial court then told Freeland she could return to the jury box. RT 2711.

Burris immediately moved for a mistrial based on Freeland's failure to disclose her brother's homicide. Had Freeland disclosed the information, Burris argued, Dyer would have been able to obtain more information and challenge Freeland for cause or peremptorily. Burris also noted that Freeland's brother was shot in the back of the head, indicating a violent death. Burris argued that Freeland's inaccurate voir dire response denied Dyer a fair and impartial jury. RT 2713-14. He argued that the motion should also be granted on the grounds of prosecutorial misconduct, since the prosecutor had also handled the case of Richard Freeland's killer. RT 2714-15.

The trial court stated that it had reviewed Freeland's voir dire responses. "She has explained her answer, and I would not characterize anything she did or did not do as demonstrating any lack of candor, as far as I'm concerned." RT 2714. Burris' motion for mistrial was denied. RT 2713, 2715. After the jury sentenced Dyer but before the trial court reviewed tne sentence, Burris sought a continuance to interview two witnesses relating to a motion for a new trial based on

juror misconduct. RT 2981-83. The court granted a continuance of nearly two weeks.

Dyer filed a motion for a new trial with the trial court based in part on Freeland's inaccurate voir dire responses. CT 432. In support of his motion, Burris argued that Freeland should have told the court not only about her brother's death but also about her estranged husband's incarceration. RT 3000. Burris argued that Freeland's willful non-disclosure during voir dire impeded Dyer's ability to select a fair and impartial jury. RT 3001-02, 3013-14.

The trial court found that Freeland's incorrect responses on voir dire were inadvertent. It found that her answers, apparently given in good faith, were reasonable in light of ambiguities in the voir dire questions. RT 3018-19. The trial court denied Dyer's motion for a new trial. RT 3021.

2

When Burris became aware that Freeland's brother had been killed and her estranged husband, Melvin Provost, was in jail, he assigned an investigator to gather more information. His investigator interviewed Freeland by telephone and conducted a background check on her. Dallas depo. at 42, 45-46. The investigator also located Provost and obtained a declaration from him.[12] Id at 47-49. Burris recalls

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12. In the September 23, 1983, declaration, Provost stated that he and Freeland have been married since 1979 and separated since 1981. Provost said he had no contact with Freeland during Dyer's trial. Shortly after the trial he saw her for fifteen minutes in Santa Rita, but they did not discuss Dyer's trial.

having research done on juror misconduct as grounds for a motion for a new trial.

Petitioner has come forward with evidence that Freeland responded incorrectly to the voir dire questions. Her family had filed a wrongful-death action against Richard's killer and recovered $15,000. Ex. 174. Freeland had been attacked by her young cousin, who had a knife, while she was lying on a couch. Freeland depo. at 60. Her father had been arrested once for kidnapping his children. Id at 64. Her brother and her uncle had both been arrested. Id at 47-48. Her family home and her car had been broken into and burglarized. Id at 53-54, 65-66.

Freeland's father, Charles Freeland, testified at the evidentiary hearing. He stated that Freeland was close to her brother; Freeland and Richard were both living with their mother when Richard was killed. EH 8, 9. Charles Freeland did not believe Richard's death was an accident and did not recall anyone discussing the killing as an accident. EH 9-11. Charles Freeland knew that his children were not happy that he took the money the family received from the wrongful-death action against Richard's killer. EH 16. He doubted, however, that he would have discussed the lawsuit with Freeland. He confirmed that Freeland had been attacked by a younger cousin and that the family home, as well as his business, had been burglarized. EH 17, 24-27.

Provost also stated that he was charged with false imprisonment and that this was his first arrest. As far as he knew, Freeland did not attend court proceedings relating to her brother's death. Ex. BB. There is no indication that Burris introduced Provost's declaration in the trial court.

3

Burris had a duty to conduct a reasonable investigation once he became aware of Freeland's erroneous voir dire responses. See, e.g., Strickland, 466 US at 691. Based on the record and the evidence presented in these habeas proceedings, the court concludes that counsel's conduct regarding juror Freeland was constitutionally adequate.

As indicated above, Burris promptly informed the trial court hen he first learned about Freeland's brother's death. He questioned her in chambers and moved for a mistrial based on her incorrect voir dire responses. Furthermore, Burris did not drop the issue when the trial court denied his motion for a mistrial. He continued to investigate Freeland and her estranged husband after the penalty phase concluded and renewed his claim of juror risconduct in a motion for a new trial.

Dyer argues specifically that Burris should have investigated and informed the trial court about the circumstances of Provost's incarceration. The trial court knew that Provost as in jail. See, e.g., RT 2693, 2705, 3000, 3009. Handwritten notes accompanying the declaration indicate that Burris was aware that this incident was Provost's first arrest.[13] Ex. BB.

He also claims that Burris should have argued to the court, in support of his motions, that Freeland must have discussed her jury service with Provost, in violation

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13. Provost was arrested and booked on May 5, 1983 on two counts of forcible rape and one count of oral copulation. He was released on bond, then rearrested and sentenced on July 19, 1983, to six months in the county jail for false imprisonment. Freeland depo. at 118.

of the trial court's daily admonition not to discuss the case. Burris did point out to the court that Freeland must have spoken to Provost about her jury service. RT 3013.

On the other hand, it is not clear that Burris could have found evidence to support his argument that Freeland had violated admonition. The declarations and depositions that petitioner has presented indicate that Freeland did not discuss Dyer's case with Provost. Provost's 1983 declaration states that he did not elk about the case with Freeland. Ex. BB. Freeland testified at her 1993 deposition that she did not discuss Dyer's case with Provost during the trial. Freeland depo. at 107, 112. It is nclear how Provost learned that Freeland was a juror in the Dyer case. Freeland said someone in the county jail must have learned she was a juror and told Provost. Freeland depo. at 113-15. Larry Bullock, who was held in a courthouse jail cell with Dyer and Provost at the time of Dyer's trial, testified that either Freeland or one of Provost's family members told him about Freeland's jury service. Bullock depo. at 11, 41-43.

Burris undoubtedly could have conducted additional investigation. Dyer's habeas counsel have uncovered other crimes that had been committed by and against Freeland's family members that she did not reveal during voir dire. Based on this record, however, the court concludes that Burris, who after all was in trial and did not have the luxury of many years to develop the facts, did not provide constitutionally inadequate assistance for failing to discover these additional crimes. See Riggins v. Butler, 705 F Supp 1205, 1212-13 (ED La 1989), aff'd 884 F2d 576 (5th Cir 1989) (attorney not ineffective for failing to learn that juror was former law enforcement officer).

II

Petitioner claims that the presence of Juror Jessica Freeland[14] on his jury denied him a fair trial and an impartial jury. Specifically, petitioner argues that Freeland's failure to disclose certain information during voir dire, combined with her conduct during and after the trial, demonstrates that she was biased.

Respondent contends first that the court must presume correct the trial court's finding that Freeland responded in good faith to the voir dire questions. Respondent also argues that petitioner is not entitled to habeas relief because he has not shown that Freeland acted dishonestly or with actual bias. If the court does not require a showing of actual bias, respondent argues that an implied bias standard is inappropriate in this case.

The Sixth Amendment "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v Dowd, 366 US 717 (1961): see also Tinsley v Borg, 895 F2d 520, 523 (9th Cir 1990), cert denied 498 US 1091 (1991). A defendant is denied his constitutional right to an impartial jury "even if 'only one juror is unduly biased or prejudiced.'" United States v Eubanks, 591 F2d 513, 517 (9th Cir 1979) (quoting United States Hendrix, 549 F2d 1225, 1227 (9th Cir 1977)); see also Tinslev, 895 F2d at 523-24. A defendant is entitled to a new trial on the basis of a juror's erroneous voir dire answer when he can demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid

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14. At the time of Dyer's trial, Ms. Freeland used the name Jez Freeland.

basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial McDonough Power Equipment, Inc. v Greenwood, 464 US 548, 556 (1984); see also Tinsley, 895 F2d at 524.

On federal habeas review, the partiality of an individual juror is a question of historical fact. Patton v Yount, 467 US 1025, 1036 (1984); Tinsley, 895 F2d at 525. A state court's factual finding about a juror's partiality is thus entitled to a presumption of correctness on federal habeas review. Yount, 467 US at 1038; Tinsley, 895 F2d at 525. The court will accept findings of fact by the state trial or appellate court unless one of the exceptions listed in 28 USC § 2254(d) applies. Tinsley, 895 F2d at 525.

State courts have had several opportunities to review and make factual findings about Dyer's claim of juror misconduct. When it learned that her brother Richard had been killed, the trial court held a hearing to assess Freeland's credibility in light of her negative response to the voir dire question about whether any of her relatives had ever been the victim of a crime. RT 2708-11 Freeland told the trial court that she believed Richard's death was an accident and that she did not think his death would prevent her from being fair. RT 2709.

The trial court found that Freeland satisfactorily explained her voir dire response. It concluded that it "would not characterize anything she did or did not do as demonstrating any lack of candor, as far as I'm concerned." RT 2714. The trial court noted, however, that it did not know how close Freeland was to Richard or how much she knew about the facts of his death. Id.

Ruling on Dyer's motion for a new trial, the trial court made a second, consistent finding about Freeland's credibility. It found that her incorrect voir dire responses were "inadvertent," and her subsequent explanations of those responses were "given in good faith." RT 3018. When it made this finding, the trial court knew not only that Richard had been killed but also that Freeland did not disclose that her estranged husband, Melvin Provost, was then in jail. RT 3019.

On direct appeal, the California Supreme Court considered whether the trial court had abused its discretion by denying Dyer's motion for a new trial based on Freeland's incorrect responses to the voir dire question about family members who had been victims of a crime. The court concluded that the voir dire question was ambiguous. "There is no evidence that F[reeland] was lying when she answered 'no' to the question." Dyer, 45 Cal3d at 59.

In rendering its opinion, the state supreme court declined to take judicial notice of either a wrongful-death action filed by the Freeland family against Richard's killer or an appellate opinion in the killer's criminal case. Id. It held that the documents should have been presented to the trial court and were incomplete; therefore, "any judgment based on them would be founded on pure speculation." Id. There is no indication that the court considered Freeland's failure to disclose that Provost was in jail.

The trial and appellate courts thus found that Freeland did not intend her voir dire answers to be deceptive. By implication, they also found her to be an impartial juror. These findings are entitled to a presumption of correctness. See Tinsley, 895 F2d at 526-26 (citing Wainwright v Witt, 469 US 412, 430-31

(1985)) (implied factual finding about juror bias may be sufficient to merit a presumption of correctness).

None of the exceptions enumerated in 28 USC § 2254(d)(1) through (7) is present. The trial court developed the facts material to this claim. See 28 USC § 2254(d)(3). It asked Freeland why she did not disclose Richard's death on voir dire and whether she could be fair. The trial court, which had the opportunity to observe her demeanor, found her response credible. See Smith v Phillips, 455 US 209, 215, 217 n7 (1982) (juror's testimony about her own impartiality is not inherently suspect). The appellate court concurred in the finding that Freeland had not been intentionally dishonest.

To show that the state courts did not adequately develop the material facts, petitioner has presented additional instances of her own and her family's involvement with the law that Freeland could have revealed on voir dire but did not.[15] Freeland explained her failure to disclose these instances at her deposition. She did not know about her brother's or Provost's arrest at the time of her voir dire. Freeland depo. at 135-36. She considered her uncle too remote to be "family." Id at 133. She did not think of herself as the victim of a crime solely because her home and car had been burglarized. Id at 124. She regarded her father's arrest for kidnapping and her cousin's assault as remote, inconsequential events. Id at 62-64. She did not know about the civil proceedings brought by her parents against kichard's killer. Id at 78. In light of her explanations and the ambiguity in the voir dire questions, this evidence does not detract from the state

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15. See section I D 2, supra.

courts' findings about her credibility. See Nix v Williams, 467 US 431, 450 (1984) (newly discovered evidence did not demonstrate that the state court did not adequately develop the material facts).

Furthermore, the record as a whole fairly supports the state court's determination that Freeland was not intentionally deceptive. See 28 USC § 2254(d)(8). For example, Provost's statements to co-counsel corroborate her testimony that she did not know whether Richard's death was a criminal offense. RT 2705, 2709. Nor has petitioner offered convincing evidence that the state court's findings of fact were erroneous. See Sumner v Mata, 449 US 539, 550 (1981); Tinsley, 895 F2d at 526.

Mindful of the "special deference to be accorded a state court's credibility findings," see Yount, 467 US at 1038, the court concludes that Freeland did not deliberately conceal material information on voir dire. See Tinsley, 895 F2d at 526; United States v Nickell, 883 F2d 824, 827 (9th Cir 1989). Petitioner's claim thus falters on the first prong of McDonough: He has not shown that Freeland responded dishonestly to a material voir dire question. See McDonough, 464 US at 556. The court thus finds no basis for an inference that Freeland was biased. See Nickell, 883 F2d at 827.

Nor will the court presume that Freeland was biased. See Tinsley, 895 F2d 526-27. The court may impute bias when there is "a relationship in which the 'potential for substantial emotional involvement, adversely affecting impartiality,' is inherent." Id at 527 (citing Eubanks, 591 F2d at 517). Bias should be presumed, however, only in extraordinary cases. Id. Reviewing courts should not impute bias to evade the deference owed to state court findings about actual bias. Id at 528.

Courts have presumed bias "where a juror or ther] close relatives have been personally involved in a situation involving a similar fact pattern." Id at 528; see, e.g., Eubanks, 591 F2d at 516 (juror in heroin distribution conspiracy case presumed biased because two of his sons were currently in prison for heroin-related crimes); United States v A11SUD, 566 F2d 68 (9th Cir 1977) (jurors in bank robbery case presumed biased because they worked for bank that had been robbed). Freeland's brother, like Dyer's victims, was shot to death. However, the circumstances of Richard's death, as Freeland understood them, clearly distinguished his killing from the murders for which Dyer stood trial. On the facts of this case, the court will not disregard the trial court's credibility finding in order to presume bias on the basis of Freeland's sibling relationship.

III

Pursuant to a 1993 stipulation and order, petitioner has filed a second supplement to his petition for writ of habeas corpus. This supplement raises one new claim about improper juror communications with the trial judge, a witness and a clergyman. It also adds allegations about Burris' failure to investigate, present and discuss with his experts Dyer's medical and developmental history. Petitioner asks the court either to admit evidence from the evidentiary hearing that is relevant to these new matters or to grant an additional hearing.

Respondent contends that the court may dispose of the new juror-misconduct claim on the basis of existing depositions. He also argues that the new allegations of ineffective assistance necessarily fail if the court concludes from Burris' evidentiary hearing testimony

that he conducted an adequate investigation. If the court does not find Burris' performance constitutionally adequate, respondent maintains, it should nonetheless deny petitioner an evidentiary hearing unless he can demonstrate that he is entitled to one.

The court concludes that the evidentiary hearing and certain depositions submitted in conjunction with the hearing provide a sufficient basis for it to address these additional claims. They *Are* discussed in turn below.

A

Petitioner argues that Burris was ineffective because he did not adequately investigate and present evidence about Dyer's "medical or developmental history (including social and economic factors)." Trial counsel unreasonably failed to have Dyer examined and tested by a doctor and a neuropsychologist and did not adequately interview Dyer, his friends and family, according to petitioner. He contends that evidence gathered from such investigation would have supported his guilt-phase defense that he could not form the specific intent necessary for first-degree murder. He claims that this evidence also would have served as important mitigation at the penalty phase.

For the reasons discussed in more detail above,[16] the court rejects petitioner's claim. Burris had Yago, Hilliard and Smith examine Dyer. Yago conducted a psychiatric evaluation and Hilliard performed psychological tests. Hilliard testified extensively about the results of his tests. Given Burris' consultation with

16. See section I A 3, supra.

and use of these experts, the court cannot agree that Burris was constitutionally required also to consult a medical doctor and a neuropsychologist.

Nor is the court convinced that Burris' investigation prejudiced Dyer. Burris introduced significant evidence to support his argument that Dyer could not form the requisite intent. In light of the prosecutor's focus on Dyer's conduct at the time of the offense, the court concludes that it is not reasonably probable that additional mental-status evidence would have affected the guilt-phase verdict. Because Hilliard testified at the penalty phase about Dyer's mental abilities, developmental history and family background, the court concludes that there is not a reasonable probability that additional evidence on these issues would have produced a different sentence.

B

Petitioner claims that he was denied an impartial jury because the jurors had out-of-court contact with the trial judge and a prosecution witness. He also claims that one juror discussed the death penalty with his pastor and that during deliberations the jurors improperly discussed the implications of a sentence of life without the possibility of parole. Petitioner argues that these incidents were prejudicial.

Respondent denies that there were ex parte communications between the jurors and the trial judge during Dyer's trial. He admits, however, that one juror had out-of-court contact with a witness. Respondent argues that he is prejudiced by petitioner's delay in raising the claim about the juror's discussion with his pastor because the juror died before he could be deposed. He also argues that an inquiry into the

substance of the jury deliberations would violate the Federal Rules of Evidence.

1

As an initial matter, the court must determine whether to admit the evidence petitioner offers in support of his claim. Petitioner presents two depositions and one unsigned declaration. The court admits the jurors' deposition testimony to the extent that it describes extraneous influences that may have been brought to their attention. The court may not admit juror testimony, however, about the subjective effect of these influences on their deliberative processes. See FRE 606(b); Rushen v. Spain, 464 US 114, 121 n5 (1983); Dallas v. Arave, 984 F2d 292, 296 (9th Cir 1993); United States v. Maree, 934 F2d 196, 201 (9th Cir 1991). Thus it will not consider petitioner's claim that the jury discussed, during its penalty-phase deliberations, the possibility that Dyer could be paroled. Bartholomew depo. at 6-7.

The court will not admit the unsigned declaration of nowdeceased juror Powers. An unsigned declaration exceeds the boundaries of even the relatively broad provisions for expansion of the record in habeas cases. See Habeas Rule 7. The declaration here does not fall within any exception to the hearsay rule and lacks a guarantee of reliability. The court thus will not consider petitioner's claim that Powers discussed the death penalty with his pastor at the beginning of Dyer's trial .

2

The Constitution guarantees a criminal defendant an impartial jury that will consider only the evidence

presented in open court. When a jury is exposed to facts not introduced in evidence, "a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence." Gibson v Clanon, 633 F2d 851, 854 (9th Cir 1980). A juror's undisclosed ex parse contact with the judge or a witness may thus rise to the level of a constitutional violation. See Rushen, 464 US at 117 n2. The violation will be deemed harmless, however, unless there was actual prejudice.[17] See id; Maree, 934 F2d at 201-02.

a

According to the depositions of two of Dyer's jurors, they encountered the trial judge once at a restaurant some time between the guilt-phase verdict and sentencing. The judge told them that they had listened to the evidence and served well as jurors. The contact was brief; the judge explained that he could not socialize with the jurors. He might have said that he could change the jury's verdict if he thought that it was incorrect. Bartholomew depo. at 5-6; Carney depo. at 7-9.

Without offering any contradictory evidence or explanation, respondent denies that there was ex parse communication between the jurors and the trial judge at any time. The court will assume, for purposes of this order, that petitioner's allegations are true. Assuming

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17. The actual prejudice inquiry for claims of improper ex parte juror contact on direct appeal is identical to the harmless error standard for trial errors on federal habeas review. See Brecht v. Abrahamson, 113 S Ct 1710, 1722 (1993). The Court in Brecht describes the standard as "whether the error had a substantial and injurious effect or influence in determining the jury's verdict." Id.

also that the communication violated Dyer's constitutional rights, the court nonetheless concludes that this chance meeting between the jurors and the judge did not actually prejudice Dyer.

The trial judge did not discuss with the jurors "any fact in controversy or any law applicable to the case." Rushen, 464 US at 12 1. He did not disclose any information about Dyer or about the case. See Maree, 934 F2d at 202. His innocuous comments could not have either deliberately or unintentionally influenced the jurors. See United States v Madrid, 842 F2d 1090, 1095 (9th Cir 1988) and cases cited therein. "We do not presume prejudice where a court or its staff show courtesy to citizens serving as jurors." United States v Velasquez-Carbona, 991 F2d 574, 576 (9th Cir 1993).

In addition, the trial court properly instructed the jury at the penalty phase to base its verdict solely on the evidence presented in court. RT 2917, 2923; see also Madrid, 842 F2d at 1095. Just before deliberations began, the trial judge instructed the jury to disregard any of his actions or comments that might influence its decision. RT 2963. The trial court's instructions, as well as the parties' arguments, emphasized that it was the jury's responsibility to sentence Dyer. See RT 2917, 2923, 2926, 2934-35, 2946, 2951, 2953,

was accompanied by two other jurors at the time. Warren said to them "something to the effect of 'Hang him' or something like that." The jurors might have told Warren not to talk to them, but they did not discuss the comment among themselves or with anyone else. Bartholomew depo. at 4-5.

The court concludes that this juror contact with Warren was also non-prejudicial. Warren testified at trial that Dyer pistol-whipped him and shot him in the head. RT 1781, 1810. His isolated, out-of-court comment to "hang him" did not disclose to the jurors any new information about Dyer, the offense or the law. The jurors' response to Warren indicates that they were conscientiously following the trial court's daily admonitions not to discuss the case. They apparently disregarded Warren's comment. As in the penalty phase, the jurors were instructed in the guilt phase to come to a verdict by considering only the evidence presented in court. RT 2500.

IV

Having reviewed the entire trial record, the court concludes that the cumulative effect of the alleged errors did not deny Dyer his constitutional right to a fair trial. Dyer's trial was not perfect, but whatever errors occurred did not, in the context of the trial as a whole, substantially influence the verdict. See Brecht, 113 S Ct at 1722; Greer v Miller, 483 US 756, 765-66 (1987). The court thus rejects petitioner's claim of cumulative error.

V

For the reasons stated above, Dyer's petition for writ of habeas corpus is DENIED. This order constitutes a final disposition of his petition by this court. The court thus VACATES the stay of execution it previously granted pending final disposition of the petition.

IT IS SO ORDERED.

Vaughn R. Walker
United States District Judge